

IN THE COURT OF APPEALS OF IOWA

No. 6-960 / 06-0483
Filed January 18, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REX ALAN COUSINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Rex Cousins appeals from his conviction for assault domestic abuse causing bodily injury in violation of Iowa Code section 708.2A(2)(b). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brett Schilling, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Rex Cousins appeals from his conviction for domestic abuse assault causing bodily injury in violation of Iowa Code section 708.2A(2)(b) (2005). He contends his trial counsel was ineffective.

We review claims of ineffective assistance of counsel *de novo*. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

Cousins contends his trial counsel was ineffective in failing to urge a weight-of-the-evidence standard in his motion for new trial. It is undisputed that the district court improperly reviewed the motion under a sufficiency-of-the-evidence standard in denying it. However, Cousins does not contend the district court was in error, instead focusing on trial counsel's performance in bringing the motion before the court. Accordingly, we will only review counsel's performance to determine whether he failed to perform an essential duty and whether Cousins was prejudiced by any such failure. We conclude Cousins's claim fails on both counts.

The "weight of the evidence" refers to a determination by the trier of fact that "a greater amount of credible evidence supports one side of an issue or cause than the other." *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998). In his motion for new trial, Cousins's trial counsel argued "there was as greater amount

of credible evidence in favor of the Defendant” Because this correctly articulates the proper standard without actually invoking it by name, counsel did not fail to perform an essential duty in bringing the motion for new trial.

Although the trial court failed to apply the proper standard in ruling on Cousins's motion, we conclude the motion would have failed even had the proper standard been utilized. The evidence supporting Cousins's conviction is overwhelming. Cousins has failed to establish prejudice. Accordingly, we affirm.

AFFIRMED.