

IN THE COURT OF APPEALS OF IOWA

No. 8-357 / 07-0933
Filed June 25, 2008

TROY REDD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

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

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Troy Redd appeals from the district court's denial of his application for postconviction relief. He claims the district court erred in denying his claim that his appellate counsel was ineffective. Upon our de novo review, we affirm. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

I. Background Facts and Proceedings

Redd was charged with burglary in the first degree, robbery in the first degree, terrorism, pimping, assault with the intent to commit serious injury, and false imprisonment based on the following facts: On the evening of March 21, 1998, Redd and Carmel Dolan went to a bar called Pat's Tap. While at the bar, Dolan observed Redd talking to and playing pool with another man. Later in the evening, Dolan and Redd returned to Dolan's apartment on Arlington Street in Waterloo. Redd became angry with Dolan's neighbor, Bill Pierce, because Pierce spent several hours that day with Dolan in her apartment. Redd told Dolan he was going to call his "brother-in-law." She overheard Redd tell the person on the phone to "bring the gun because he was going to kill Bill." Approximately fifteen minutes later, the same man Dolan saw with Redd in Pat's Tap arrived at her apartment with a shotgun. Redd and the other man went up to Pierce's apartment. Several shots were fired through Pierce's front door. Pierce was inside his apartment at the time. Redd and the other man then fled the scene.

Later the same evening, Redd and Cletus Johnson were together at the Jet Lounge in Waterloo, Iowa. Two women, Larsie Epps and Rebecca Worth, joined them at the bar, and after several minutes the four returned to Epps's

apartment on Lincoln Street in Waterloo. Worth and her boyfriend, Shawn Nosko, lived across the hallway from Epps in another apartment. Nosko was sleeping in his apartment when Johnson, Redd, Epps, and Worth returned to the building. At some point, Nosko entered the hallway and overheard Worth make a comment to Redd and Johnson that he interpreted to be sexual in nature and made him jealous. Nosko said “Fuck you, bitch” to Worth and returned to his apartment. Johnson and Redd then entered Nosko’s apartment, assaulted both Nosko and Worth, and robbed Nosko at gunpoint. Redd and Johnson were arrested later; however, the gun was never recovered.

The district court severed the burglary and robbery charges (Lincoln Street incident) from the other charges (Arlington Street incident). Redd filed a motion in limine seeking to exclude all evidence of the Arlington Street incident at the trial concerning the Lincoln Street incident. The district court’s ruling excluded some of the evidence, including “the shooting through a door. . . .” Nonetheless, the State offered the testimony of three witnesses—Officer Richard Gehrke, Pierce, and Dolan—who testified bullet holes were found in Pierce’s door or were shot through his door. Redd was found guilty of and sentenced for these two charges. He was later found guilty of and sentenced for terrorism and assault.

On direct appeal, Redd’s appellate counsel argued “trial counsel was ineffective for failing to object to Officer Gehrke’s testimony regarding the bullet holes in Pierce’s door on the grounds the evidence was inadmissible based on the district court’s ruling on the motion in limine.” *State v. Redd*, No. 99-0686 (Iowa Ct. App. Nov. 20, 2000). We rejected this claim because “there is no prejudice from admission of evidence where substantially the same evidence is

elsewhere in the record without objection”—that is, the testimony of the other two State’s witnesses—and affirmed Redd’s convictions. *Id.*

Redd filed an application for postconviction relief, claiming his appellate counsel was ineffective for failing to argue the other two State’s witnesses also testified in violation of the district court’s ruling on the motion in limine. The district court’s May 9, 2007 ruling found Redd failed to show prejudice and denied his application.

II. Ineffective Assistance of Appellate Counsel

To prevail on an ineffective assistance of counsel claim, the applicant has the burden of proving by a preponderance of the evidence that “(1) counsel failed to perform an essential duty, and (2) prejudice resulted.” *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, “the [applicant] must overcome the presumption that counsel was competent and show that counsel’s performance was not within the range of normal competency.” *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, the applicant must show “a reasonable probability exists that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of an ineffective assistance of counsel claim if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Even if we assume without deciding counsel breached an essential duty in the particular claimed, we are nevertheless required to affirm because Redd has failed to prove the prejudice element of his ineffective assistance of counsel claim. “[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. We find the evidence against Redd was overwhelming. Witnesses testified Redd and the man from Pat’s Tap had a shotgun at the Arlington Street address and Redd had the gun at the Lincoln Street address. Witnesses also testified they heard Redd state he wanted to kill Pierce and heard gunshots at the Arlington Street address. In addition, an exhibit admitted into evidence shows bullet holes in Pierce’s door. Finally, witnesses testified Redd used the gun to rob and burglarize Nosko at the Lincoln Street address. We accordingly affirm.

AFFIRMED.