IN THE COURT OF APPEALS OF IOWA

No. 9-221 / 08-0592
Filed June 17, 2009

BOBBY RAY DEVERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, William H. Joy, Judge.

Appellant appeals the district court's ruling denying his applications for postconviction relief. **AFFIRMED.**

Drew Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Matthew Wilber, County Attorney, and Margaret Reyes, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VOGEL, P.J.

Bobby Ray Devers appeals the district court's ruling denying his applications for postconviction relief.[1] We affirm.

On January 23, 2004, Devers was convicted of first-degree sexual abuse under Iowa Code sections 709.1 and 709.2 (2003). His conviction was affirmed by this court in *State v. Devers*, No. 08-592 (Iowa Ct. App. March 31, 2005), with claims of ineffective assistance of counsel being preserved for possible postconviction proceedings. Two separate applications were then filed seeking postconviction relief: one through counsel and one pro se. After a hearing, the district court considered and denied both in their entirety. Devers appeals.

I. Scope of Review.

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Devers must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id*. A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The

[1] Devers's motion for limited remand filed on March 17, 2009, is hereby denied.

ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

II. Facts Presented to the Jury.

The following facts are taken from our 2005 *Devers* opinion:

> From the evidence presented at trial the jury could find the following facts. Several hours after leaving [her boyfriend's] home S.A. came into contact with the defendant, Devers, who offered her a ride. S.A. fell asleep in Devers's car and when she awoke they were at the Super 7 Motel in Council Bluffs, Iowa. Devers obtained a key to room 243 and the two went up to the room together. The two then smoked marijuana together and when she wanted to leave Devers "jumped on" her like he was "attacking her," "like a football player making a tackle." S.A. struggled with Devers. During the struggle she noticed he had a knife with a yellow handle in his hand. Devers cut S.A. with the knife on the right side of her face from cheekbone to jawbone. Devers forced his fingers into her vagina, telling her: "Shut up, bitch. I'm going to kill you. Be good." Devers then forced his fingers into S.A.'s mouth and she bit him hard enough to cause a wound. In addition to her deep facial wound S.A. sustained several other injuries, including injuries to her forehead, inner thigh, knees, ankles and hand.
>
> Eventually S.A. escaped the room and attracted the attention of Ed Van Severen, the motel maintenance man, with her screaming. Van Severen had seen Devers and S.A. pull into the motel in Devers's car. The female he heard screaming was saying "rapist" and "I'm not going nowhere with you." As Van Severen found the source of the screaming and was heading toward S.A., he saw Devers drive away past him in the same car Devers had arrived in. When Van Severen noticed that S.A.'s face was dripping blood he went into room 236 and called 911 for help. S.A. followed him into the room and told Van Severen that she wanted to go home and that Devers had cut her.
>
> Devers testified on his own behalf at trial. He testified that he got to the Super 7 Motel on the date in question at approximately 1:05 p.m. in order to finish shampooing carpets he had started cleaning two weeks earlier. He saw S.A. near the entrance to the motel but did not know her. Devers testified that S.A. flagged him down and offered him sex in exchange for transportation to Gretna or for money. She told Devers her feet were hurting and asked if she could sit in his car, so he let her into the car and proceeded to park in one of the spaces in front of the motel office. Devers testified he then went into the office to talk to the motel manager but the manager was not there. He spoke to

> the manager's wife, who gave him the key to room 243 because that was the room at which he had left off when shampooing earlier. However, the wife told Devers he would have to wait until her husband got back to start the room. Devers testified that while he was in the office, and when he came back out, he saw S.A. talking to Ed Van Severen and petting the dog Van Severen had with him.
>
> Devers testified he then went to room 243 to wait for the motel manager. As he waited S.A. approached him several times. He testified that at one point he agreed to walk to the store and buy S.A. a pack of cigarettes and a soda, and he talked with her about her boyfriend and how she got to the motel. Devers admitted that during the time he was in room 243 he smoked some marijuana. He claimed that then while in the restroom he heard someone knock and it was S.A. again. Devers testified S.A. asked if she could come into the room and he refused. He then saw S.A. leave down a flight of stairs. He testified he eventually gave up waiting for the motel manager and left. As he was driving away Devers saw S.A. and another man on the balcony and saw Van Severen and another man on the ground level. Throughout the proceedings Devers denied he assaulted S.A. in any way and stated that he "never laid a hand on her."
>
> Based on Van Severen's call to 911 Officers Dudik and Zika of the Council Bluffs Police Department were dispatched to the motel. When they arrived Van Severen flagged them up to a room on the top balcony. Officer Dudik testified that when he saw S.A. she was "crying hysterically," bleeding from some cuts on her face, and told him she had just been sexually assaulted. S.A. told the officers that room 243 is where the assault occurred. Dudik testified that when he opened the door to room 243 there was an overpowering smell of marijuana. S.A. was then allowed to go to the hospital with the paramedics. Both S.A. and Van Severen later identified Devers from separately conducted photo line-ups as the man who had been at the motel and had assaulted S.A.

State v. Devers, No. 08-592 (Iowa Ct. App. March 31, 2005).

III. Ineffective Assistance of Counsel.

On appeal Devers asserts the district court erred in failing to find his counsel, Greg Steensland, was ineffective in five respects. He claims counsel was ineffective for (1) allowing improper impeachment evidence, (2) failing to object to marijuana evidence, (3) failing to request a mistrial, (4) failing to call

Howard Dickey as a defense witness, and (5) failing to object to prejudicial matters during Devers's cross-examination.

A. Improper Impeachment

Devers first asserts Steensland was ill prepared to defend him, as he allowed improper impeachment of his character witnesses. Devers offered the testimony of four friends or family members who all described Devers as having a peaceful, kind nature. However, on cross-examination, each was asked whether they knew of Devers's prior history, specifically regarding negative aspects of Devers's character, such as his use of marijuana, his prior affair, and his being on probation for an assault conviction.

Devers claimed that he was not aware his attorney was intending to call these four witnesses to testify, but the court found this claim was simply not credible. We defer to the district court's credibility assessments. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). The district court then found the mention of the prior affair and marijuana use was already in the record before the character witnesses testified, and was therefore cumulative. *State v. Hood*, 346 N.W.2d 481, 484 (Iowa 1984). Moreover, by offering character witness testimony, Devers opened the door to permissible rebuttal questions by the State. Iowa R. Evid. 5.404(*a*)(1); *State v. Scalf*, 254 Iowa 983, 989-90, 119 N.W.2d 868, 872 (1963) (holding character witness testimony opens the door for controverting testimony in rebuttal). Steensland testified by way of deposition in August 2006, and admitted that some of the questions asked could have been objected to, but at the time did not think it was necessary. We agree with the district court that it is a reasonable trial strategy for counsel to choose to not object to some

questioning, thereby avoiding underscoring the import of the witnesses' answers to those questions. As Steensland testified, "I don't believe I objected to any of this, because we were sliding right through it." Accepting the risk of some negative information being admitted, balanced against the many positive comments Devers's character witnesses offered, is a reasonable trial strategy. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). Steensland's explanation was accepted by the district court and we affirm the finding of no breach of duty as to this claim.

B. Failure to Object to Testimony

Devers next claims Steensland failed to object to S.A.'s testimony that she and Devers smoked marijuana together prior to the alleged incident, and that a later investigation of the motel room indicated the presence of marijuana. At the postconviction hearing, Steensland testified that the jury could have just as easily used the marijuana testimony to view the victim with some skepticism, as the testimony included her smoking the marijuana with Devers. In fact, the victim testified that at the time she was with Devers, she was already on some controlled substances, as well as medication for an "array of things." Steensland characterized the marijuana testimony as a sword that "cut both ways," that is, it shed a negative light on the victim as well as on Devers. For the reasons cited above as to trial strategy, we agree with the district court's finding of no breach of essential duty.

C. Mistrial

Devers next claims Steensland failed to request a mistrial when two jurors alerted the court of their acquaintance with the witness, Van Severen. A mistrial

is appropriate only when an impartial verdict cannot be reached or the verdict would have to be reversed on appeal due to an obvious procedural error in the trial. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). At the postconviction hearing, one juror testified that he had worked with Van Severen some years earlier, but had not seen him in over ten years.[2] In addition, the juror testified he had little to do with Van Severen, other than occasionally exchanging a casual greeting. The district court did not find credible Devers's claim that he and Steensland never discussed this potential problem. In his deposition, Steensland stated that he had explained the option of a mistrial to Devers and his wife, discussed the possible concerns regarding these two jurors, and together they decided that "maybe knowing [Van Severen] could cut both ways, and wasn't necessarily going to hurt [Devers]," and based on Steensland's conversations with Devers and his wife, Steensland would not have done anything differently. The district court then proceeded to find Devers failed to prove any bias in the juror's ability to carry out his duties. The remaining juror testified at the postconviction hearing that his familiarity with Van Severen years prior did not influence his decision nor affect the verdict. *See State v. Hendrickson*, 444 N.W.2d 468, 472 (Iowa 1989). The district court correctly found no breach of an essential duty in not moving for a mistrial.

[2] The second juror who also had worked with the witness had died prior to the postconviction hearing.

D. Failure to Call a Witness

Devers next asserts his attorney failed to call Howard Dickey, the boyfriend of the victim, to testify, claiming Dickey's testimony could have impeached S.A.'s testimony. Steensland testified:

> [I]n light of Judge O'Grady's ruling on the rape shield and in light of the fact that I didn't trust Dickey to change his story, . . . I decided not to call him as a witness, plus, he was hard to run down. . . . He was a difficult person.

The district court found no breach of duty, as Dickey would not be able to provide any information relevant to the issues at trial. An applicant must show that there is a reasonable probability that the outcome would have been different if his counsel had presented the testimony of additional witnesses, and Devers did not show this. *Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984). While Dickey could testify to events that occurred several hours before the assault, none would undermine the testimony that was admitted. Devers himself acknowledged picking the victim up in his car, and being at the hotel with her, thereby minimizing any impact of any inconsistency as to what time the victim left Dickey's home. Therefore, we agree with the district court there was no showing of a breach of duty in not calling Dickey as a witness, nor a showing of prejudice had Dickey been called to testify.

E. Failure to Object to Prejudicial Matters

Finally, Devers claims his attorney failed to object to prejudicial matters raised during the State's cross-examination of him. The State questioned Devers as to his initial statements given to Detective Weddum, regarding why he was going to the motel on the night of the assault. Devers answered that later on in

the evening he was going to meet a woman there whom he was having "a physical relationship" with at the time. Steensland did not remember what his analysis of that testimony was, but surmised, "[W]e may have decided that it would—it would show an element of honesty on [Devers's] part." The district court found Devers used his relationship with another woman to explain his reason for being at the motel the night in question. It further found Devers failed to demonstrate prejudice from this brief answer during his cross-examination. Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). Therefore, we agree with the district court there was no breach of duty in not objecting to this testimony.

IV. New Trial

Asserting the discovery of new evidence, Devers claims he is entitled to a new trial. Devers offered the depositions of two inmates, each of whom claimed to have been at the motel the day of the assault, and each claimed to have seen the victim arguing and being beaten by or fighting with a young man with a nose ring. Pursuant to Iowa Code section 822.2(4) (2005),[3] Devers may seek postconviction relief if he claims "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." However, in order to be granted a new trial under Iowa Code section 822.2, Devers must show: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the

[3] Iowa Code section 822.2(4) (2003) is now renumbered to Iowa Code section 822.2(d) (2009).

exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003).

The district court noted the discrepancies between the depositions of the two inmates and the testimony of other witnesses at trial and found, "this evidence is neither material nor likely to have changed the result of the trial if it had been presented." Without restating each of the findings the postconviction court made, which support that conclusion, we agree. Devers has failed to prove the last two elements to warrant a new trial and the postconviction court did not err in failing to grant him a new trial.

V. Pro Se Issues.

Devers also raises a number of pro se issues, which are either not preserved for our review, subsumed in his appellate counsel's arguments, or otherwise without merit.

VI. Conclusion.

For all of the reasons set forth above, we conclude the district court's well reasoned and detailed decision denying Devers's application for postconviction relief should be affirmed, and his request for a new trial was appropriately denied.

AFFIRMED.