IN THE COURT OF APPEALS OF IOWA

No. 9-737 / 08-1679
Filed November 25, 2009

MONTOLLIE WARREN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, James E. Kelley, Judge.

An applicant appeals the district court's denial of his application for postconviction relief, contending, among other things, that the court erred in finding trial counsel was not ineffective for failing to challenge the proof on one element of his burglary charge. **AFFIRMED.**

Brian Farrell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Michael Wolf, County Attorney, and Elizabeth Srp, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Mansfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

Montollie Warren appeals the denial of his postconviction relief application.

I. Background Facts and Proceedings

Eric Lundquist hosted a party at his house. He invited several people, including Warren. Warren brought his girlfriend, Lennette Varner. During the party, Warren and Varner had an argument which culminated in physical violence. Specifically, Warren backhanded Varner, knocking her to the floor, and attacked another guest who tried to separate the two. Warren was escorted to the garage. Varner, who had Warren's car keys, followed Warren. Upon seeing her, Warren attacked her again. At this juncture, Warren was told to leave and one of the guests gave him a ride to his hotel.

Approximately one and a half or two hours later, Warren returned to Lundquist's house. He entered through the garage, came into the kitchen, and assaulted Lundquist and another guest with a baseball bat.

A jury found Warren guilty of first-degree burglary and other crimes. Warren filed a direct appeal that only raised a challenge to a fine that was imposed at sentencing. After the appeal was resolved, Warren filed an application for postconviction relief, raising several ineffective-assistance-of-counsel claims, including an assertion that he "was invited into the house." Following a hearing, the district court denied the application.

On appeal, Warren's attorney challenges the proof on one element of the burglary charge. He maintains Warren's previous attorneys were ineffective in

failing to raise the issue. In a pro se filing, Warren separately raises several other issues.

II. Burglary

The jury was instructed that the State would have to prove the elements of first-degree burglary, including that "[t]he defendant did not have permission or authority to break into or enter the house." Warren's attorney argues that the State failed to satisfy its burden of proving this element. While he concedes that Warren's trial attorney raised this issue via a motion for directed verdict, which was also renewed at the close of trial, he asserts that counsel also should have "raise[d] the issue in a motion for new trial or other post-trial motion."

To prevail on this ineffective-assistance-of-counsel claim, Warren must show that counsel's performance was deficient and prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). On the prejudice prong, Warren must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. We only find it necessary to address the prejudice prong.

At trial, Lundquist testified that he asked Warren to leave and he did not invite Warren back. He continued, "And I sure didn't invite him back with a baseball bat." According to Lundquist, Warren barged in uninvited a short time later, wielding a baseball bat.

Based on this record, we conclude there is no reasonable probability that the district court would have granted a new trial under any applicable standard for assessing new trial motions. We reach this conclusion notwithstanding

contradictory testimony from one of Warren's friends, as that testimony was not consistent with the witness's prior deposition statements. Because there was no reasonable probability of a different outcome, appellate and postconviction counsel were not ineffective in failing to raise this argument.

III. Other Claims

Warren first asserts that "[c]ounsel violated Appellant 6th amendment—gives you the right to a fair trial, and effective assistance of counsel." This claim is too vague to be considered. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) ("The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome.").

Warren next states, "Counsel failed to investigate for physical evidence of alleged choking of homeowner with baseball bat, or request for evidence of physical attack on homeowner." As the State points out, injury to the homeowner was not an element of first-degree burglary that the State was charged with proving. The jury instruction on first-degree burglary only required a showing that Warren "intentionally or recklessly inflicted bodily injury on Tanya Lundsford," a guest at the party. Accordingly, trial counsel did not breach an essential duty in failing to pursue this issue. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998).

Warren also asserts that counsel was ineffective in failing to seek the postconviction judge's recusal on the ground that he previously heard the underlying criminal matter. Only personal bias or prejudice coming from an extrajudicial source can be classified as a disqualifying factor. *State v. Millsap*,

704 N.W.2d 426, 432 (Iowa 2005). As Warren has not shown that the judge displayed any extrajudicial bias or prejudice against him, we conclude that postconviction counsel was not ineffective in failing to pursue that issue.

Next, in two separate assignments of error, Warren argues that trial counsel was ineffective in failing to point out inconsistencies between various witnesses' deposition and trial testimony. This issue was not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Warren argues broadly that trial counsel did not "prepare defense or offense for trial," but also argues more specifically that counsel was ineffective in not asserting a claim of self-defense to any of the assault charges. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3 (2007). The record contains insufficient evidence to create a submissible issue on whether Warren was defending himself when he reentered Lundquist's home wielding a baseball bat. Accordingly, we conclude trial counsel had no duty to raise this issue.

Warren also appears to argue that counsel was ineffective in failing to seek an instruction on trespass as a lesser-included-offense of burglary. As this argument was raised for the first time in his reply brief, we decline to consider it. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) ("[W]e have long held that an issue cannot be asserted for the first time in a reply brief.").

Finally, Warren complains that "[c]ounsel didn't argue the fact of discrimination, and prejudice on defendant, in which [sic] court didn't produce any African-Americans in Jury Pool." On this issue, the district court stated:

> Defendant presented no evidence of the population statistics of Clinton County to show that in the jury pool there would have been a certain number of African American citizens called by a random selection process. The Applicant as a Defendant in a criminal case would first have to prove by a preponderance of the evidence that the jury pool was improperly called by the clerk of court. There is complete failure of proof on this issue by the Applicant. *See State v. Jones*, 490 N.W.2d 787, 791 (Iowa 1992).

We agree with the district court. When asked about this claim at the postconviction hearing, Warren simply stated, "there was not one African American present to be struck from selection." This falls short of the required prima facie showing he needed to make. *See Jones*, 490 N.W.2d at 792 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 586–87 (1979)).

IV. Disposition

We affirm the district court's denial of Warren's application for postconviction relief. [1]

AFFIRMED.

[1] After this appeal was submitted and transferred to the Court of Appeals, Warren filed a motion titled "interlocutory appeal." We deny the motion as untimely.