IN THE COURT OF APPEALS OF IOWA

No. 0-866 / 08-1962
Filed February 9, 2011

SHAWN SHELTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lucas County, David Christensen, Judge.

Applicant appeals the dismissal of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Shawn P. Shelton, Newton, pro se.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Paul M. Goldsmith, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Applicant, Shawn Shelton, appeals from the district court's order dismissing his postconviction relief application. Shelton claims his trial and former appellate counsel were ineffective because they failed to object to various jury instructions and failed to challenge the sufficiency of evidence on the elements of pre-meditation and lack of justification. Shelton also claims his current appellate counsel was ineffective in seeking to have his former appellate counsel's proof brief stricken in this pending appeal. Shelton claims that he should be excused from the affirmative defense of statute of limitations as the district court on two occasions ordered him to stop filing motions with the court and also claims that the State waived any affirmative defense of statute of limitations at the trial court level. Finally, Shelton asks that this court officially rule that his motion to correct illegal sentence was an application for postconviction relief. We affirm the district court's dismissal.

I. BACKGROUND AND PROCEEDINGS. In the early morning hours of July 3, 1989, applicant, Shawn Shelton, and Ivan Eugene Swigart were leaving a party in Chariton, Iowa. Upon exiting town they observed a pickup truck behind them that they believed was following them. Shelton pulled his vehicle over to the side of the road hoping the pickup would drive by. Instead the pickup stopped along side of him and the occupants, Terry Allen Masters and Dwight Kennedy, inquired whether Shelton needed assistance. Shelton asked Masters and Kennedy "what the f*** is your problem" and told them to stop following him. Shelton then sped off throwing gravel at Masters' truck. Shelton proceeded

down the highway until he reached a gravel road. He turned onto the gravel road in an attempt to lose Masters and Kennedy. When Masters and Kennedy proceeded past the gravel road turn off, Shelton turned his vehicle around and proceeded back to the main highway. On his way back to the highway, Shelton again encountered Masters and Kennedy driving in the opposite direction down the gravel road. The vehicles seemed to engage in a game of "chicken" with Shelton swerving at the last minute toward the ditch. Masters and Kennedy proceeded down the gravel road as Shelton backed his vehicle out of the ditch and brought it to a stop in the roadway.

Shelton then removed a disassembled shotgun from behind his seat, put it together and loaded it. Shelton told his passenger, Swigart, "we have to kill them before they kill us." Swigart took the shotgun and exited the vehicle taking position in the rear.[1] Masters and Kennedy by this time had turned around on the gravel road to head back toward Shelton. As they approached the Shelton vehicle, Masters and Kennedy observed Swigart with the gun. Masters slowed his vehicle and began to back up slowly. Masters and Kennedy both ducked below the dash board with Masters peaking above the dash to guide the vehicle backwards. Swigart fired the gun[2] hitting Masters' windshield just above the dash board. The bullet struck Masters on the left side of the face, killing him instantly.

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[1] There is some question as to whether Swigart was in the bed of the pickup truck or standing outside the bed near the rear passenger side.

[2] There is a question as to whether Swigart fired twice or three times. However, it is undisputed that the shot that Swigart fired was the one that killed Masters.

Swigart returned to the cab of Shelton's pickup truck stating "let's get the hell out of here" and Shelton proceeded to drive back toward the highway. On the way back, Shelton informed Swigart that they had to return to the scene in order to retrieve the shotgun shells because they had their fingerprints on them and they needed to make sure that both occupants were dead. When they reached Masters' pickup truck, Shelton took the gun from Swigart and fired three more times at the pickup truck. Swigart reached inside the Masters vehicle to turn off the headlights. They picked up some of the shells and then left the scene. They turned off their headlights and headed in the opposite direction of the highway because they had seen another vehicle traveling down the gravel road toward them.

Shelton was arrested and charged with murder in the first degree in the death of Masters and attempted murder as to Kennedy. Shelton was convicted on both counts and sentenced on January 22, 1990. Shelton appealed this conviction and the Iowa Supreme Court reversed and remanded for a new trial on grounds that are not relevant to this appeal. At the second trial, Shelton was represented by Peter Berger and Ward Rouse. Their sole defense at the trial was that Shelton acted in self-defense. The jury again found Shelton guilty on both counts, and on October 7, 1991, he was sentenced to life in prison for the death of Masters and twenty-five years for the attempted murder of Kennedy.

Shelton once again appealed this conviction and Kermit Dunahoo was appointed to represent him. During the pendency of the appeal, Mr. Dunahoo

filed a motion to withdraw pursuant to Iowa R. App. P. 104[3] asserting that the appeal was frivolous. After consideration of Shelton's pro se resistance to this motion, the Iowa Supreme Court granted Dunahoo's motion on June 8, 1992 and dismissed the appeal without prejudice to any claim for ineffective assistance of counsel in a postconviction relief action under Iowa Code chapter 663A.

Shelton then filed a pro se motion for correction of illegal sentence with the district court on August 12, 1992. In response, the court appointed counsel for Shelton and stated that it would consider this motion as a petition for postconviction relief and directed counsel to file the petition pursuant to Iowa Code chapter 663A (1991).

For reasons unknown to this court, the postconviction relief action languished in the district court from August 1992 until June 13, 2008 when Shelton's newly appointed counsel filed an amended postconviction application. The postconviction relief trial took place on August 14, 2008 and was fully submitted to the court on October 17, 2008. On November 5, 2008 the district court dismissed the application and amended application finding there was no evidence that trial or appellate counsel were ineffective. The court further held that the evidence against Shelton was overwhelming that he aided and abetted Ivan Swigart in the murder of Masters and the attempted murder of Kennedy.

Shelton's counsel filed a motion to enlarge the ruling asking the court to specifically order that it had considered and rejected all of Shelton's claims in order to preserve error on appeal. The motion was granted and on December 2,

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[3] Now Iowa R. App. P. 6.1005.

2008, the court ruled that it has considered and denied all of Shelton's claims in his postconviction relief trial. It is from this final decision that Shelton now appeals.

II. STANDARD OF REVIEW. The scope of review of postconviction relief proceedings is typically for errors at law. *Rhiner v. State*, 703 N.W.2d 174, 175 (Iowa 2005). However, alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). Under this review, we independently evaluate the issues considering the totality of the circumstances. *Id.*

III. INEFFECTIVE ASSISTANCE OF COUNSEL. In ineffective-assistance-of-counsel claims, a defendant must show that his trial or appellate counsel (1) failed to perform an essential duty, and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If either element is not met, the claim will fail. *Anfinson*, 758 N.W.2d at 499. To demonstrate prejudice, the defendant must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

A. Failing to Object to Jury Instruction No. 32 on the Justification Defense. Shelton claims that both his trial and appellate counsel were ineffective for failing to object to Jury Instruction No. 32, which was applicable to his defense of justification. Specifically Jury Instruction No. 32 states:

> A person may use reasonable force to prevent injury to a person, including the defendant. The use of this force is known as justification.

> The State must prove the defendant was not acting with justification. **In this case, if the State has proved Ivan Eugene Swigart was not acting with justification, then it has established the defendant was not acting with justification**. If the State has failed to prove Ivan Eugene Swigart acted without justification, the defendant is not guilty.
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> Justification does not apply in this case to any shots you find were fired by the defendant, and the State does not have the burden of proving no justification in such circumstances.

(Emphasis added.) Shelton objects to the highlighted sentence above asserting that this sentence is an improper statement of the law on the defense of justification under the aiding and abetting theory. The State asserts that the jury instruction is a proper statement of the law and Shelton's justification defense rose or fell with Swigart's justification defense so long as Shelton remained an accomplice of Swigart.

Iowa law on aiding and abetting provides,

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. **The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt**.

Iowa Code § 703.1 (1989) (emphasis added)[4]. The guilt of Shelton under an aiding and abetting theory cannot be predicated on Swigart's guilt and we hold that this applies to his defenses as well. It is true that if Swigart was justified in killing Masters, Shelton could not be found guilty of aiding and abetting Swigart because there was no crime for Shelton to aid and abet. *State v. Wilson*, 236 Iowa 429, 443-44, 19 N.W.2d 232, 239 (1945) (holding if the homicide was

[4] This code section has remained the same since the date of the charged offense in 1989.

justifiable because the principal acted in self-defense, no crime was committed and the accessory could be guilty of no crime by aiding the principal). However, the opposite principal is not true. Shelton can only be found guilty of aiding and abetting Swigart from the facts that show what part Shelton played in the crime. *State v. Smith*, 100 Iowa 1, 4, 69 N.W. 269, 269 (1896). The court in *Smith* demonstrated this point by the following illustration:

> He [principal] may have fired it [the gun] with such premeditation and malice as to have committed the offense of an assault with intent to commit murder; yet the defendant [accessory] may have abetted or counseled it in the heat of passion, without premeditation, and without malice, and thus have been guilty of the offense of assault with intent to commit manslaughter.

Id. While both Swigart and Shelton can be charged as a principal under the aiding and abetting statute, their guilt for the charged offense has to be considered independently of each other allowing each defendant to assert his own defenses based on the role that each played in the commission of the charged offense.

The law of aiding and abetting must be differentiated from a charge of conspiracy. In conspiracy, a defendant engaged in a criminal act is liable for the acts of his co-conspirators which were done in the furtherance of the common plan. *Id*. However in aiding and abetting, the guilt of each person must be determined alone from the part he played in the transaction. In *State v. Pasnau*, 118 Iowa 501, 502, 92 N.W. 682, 682–83 (1902), the defendant asserted the defense of intoxication to negate the specific intent requirements of the charged crimes. Defendant was charged under both a conspiracy theory and an aiding and abetting theory, but there was no doubt that the defendant himself did not

commit the crime. *Id.* The trial court's jury instructions provided that if the jury found the defendant was so drunk at the time of the crime that he was incapable of forming the specific intent to kill, then he cannot be found guilty unless he was aiding and abetting others or was part of a conspiracy. *Id*. at 503, 92 N.W. at 683. The Iowa Supreme Court held that this was an incorrect statement of the law respecting the aiding and abetting charge, but correctly stated the law applicable to conspiracy. *Id*. at 504, 92 N.W. at 683. Under aiding and abetting the defense of intoxication should have had the same application as if the defendant had been the acting principal. *Id*. If he was so drunk that he could not form the specific intent if he was the acting principal, then he should have been acquitted as well under the theory of aiding and abetting. *Id.* However, under the law of conspiracy, all parties to a conspiracy are liable for the act, even though the particular harm inflicted was not in the minds of all the conspirators. *Id*. at 504–05, 92 N.W. at 683. Thus, the defendant's intoxication would have been no defense under the theory of conspiracy. *Id*.

The jury instruction in this case is improper because it did not permit the jury to consider Shelton's state of mind at the time he aided and abetted Swigart. It simply declared that if Swigart was not justified, neither was Shelton. Just as "A" can kill with premeditation and malice warranting a conviction of murder in the first degree, while "B" aid and abet "A" in the heat of passion warranting a conviction of voluntary manslaughter; so too can "A" kill without justification, but "B" aid and abet "A" with justification. *See Smith*, 100 Iowa at 4, 69 N.W. at 269.

At the postconviction relief trial both of Shelton's trial counsel, Rouse and Ward, testified that they now believe Jury Instruction No. 32 was an incorrect statement of the law as applicable to Shelton's case. They conceded that they failed to perform an essential duty, i.e., objecting to this jury instruction. We also agree that the jury instruction was an incorrect statement of the law and now must look at whether Shelton was prejudiced by this failure. *Anfinson*, 758 N.W.2d at 499.

To demonstrate prejudice, Shelton must show that this error resulted in his actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions. *State v. Hill*, 449 N.W.2d 626, 628–29 (Iowa 1989) (citing *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1595, 71 L. Ed. 2d 816, 832 (1982)). When an erroneous jury instruction is given, several factors can weigh against finding of prejudice. *State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984). First, there is no prejudice when a separate instruction correctly informs the jury on the element at issue. *Id*. Here upon our review of all the jury instructions given, the jury was never instructed to consider Shelton's defense of justification separately from Swigart's actions. All of the instructions pertaining to justification were drafted to instruct the jury that Shelton's justification defense rose or fell based on whether Swigart was justified.

Secondly, there is no prejudice if the instruction at issue is not a fighting issue in the case. *Id*. Here, Shelton's defense of justification was the only defense he put forward in the trial. There was no question that Swigart fired the shot that killed Masters. There was no question that Shelton was the one that

assembled and loaded the gun. The central issue of the case was whether or not Shelton was acting in self-defense. This central issue was never submitted to the jury because the jury was instructed to determine only if Swigart was justified.

Finally, there is no prejudice in an erroneous jury instruction if there is so much evidence of guilt that no reasonable probability exists that the result would have been different if the correct instruction was given. *State v. Hopkins*, 576 N.W.2d 374, 379 (Iowa 1998). The State has the burden to prove that Shelton did not act with justification. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1999). The State can meet this burden by proving any one of five elements:

1. The Defendant started or continued the incident which resulted in death; or
2. An alternative course of action was available to the Defendant; or
3. The Defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save himself; or
4. The Defendant did not have reasonable grounds for the belief; or
5. The force used by the Defendant was unreasonable.

Id. The State asserts in this case that the evidence establishes that they met their burden under a number of the elements above.

First, the State claims the evidence showed Shelton had an alternative course of action available to him, i.e., driving away from Masters and Kennedy. Both Swigart and Shelton testified that there was nothing between their vehicle and the highway after Masters had run them off the road. State also asserts that Shelton continued the incident by assembling and loading the gun and lying in wait after Masters had passed them on the gravel road. The State contends that

Shelton was not in imminent harm when he assembled the gun because Masters had not yet turned around according to Swigart's testimony. Finally, the State asserts that Shelton's use of force was not reasonable as a far less lethal force would have stopped Masters such as driving away from the scene, or firing a warning shot in the air.

We believe Shelton has not sustained the prejudice prong on this claim for ineffective assistance of counsel. While we find that the justification jury instruction was an incorrect statement of the law, the great weight of the evidence admitted at trial demonstrates that no reasonable probability exists that the result would have been different if the correct instruction was given. *Hopkins*, 576 N.W.2d at 379. The State more than met its burden to prove that Shelton, apart from Swigart, was not acting with justification when he retrieved, assembled, and loaded the shotgun. Shelton admitted that he had an alternative course of action available—driving back to the highway and back into town. In addition, when Shelton retrieved the gun and handed it to Swigart, the Masters vehicle had not yet turned around to pursue them indicating there was no imminent danger.

B. Failing to Object to Jury Instruction No. 27 on Causation. Shelton next asserts that his trial and appellate counsel were ineffective for failing to object to Jury Instruction No. 27 on causation. Jury Instruction No. 27 states, "concerning element no. 2 of instructions no. 13, 20, 21 and 24 the **wound inflicted by the defendant** resulted in the death of Terry Allen Masters, if it caused or directly contributed to Terry Allen Masters' death." (Emphasis

added.) Shelton claims this jury instruction is in error because the evidence showed that Masters had only one gunshot wound and the undisputed evidence at trial was that this shot was fired by Swigart.

Shelton also asserts this error was further amplified when one considers jury instruction No. 27 in conjunction with the third paragraph of instruction No. 32 above, "Justification does not apply in this case to any shots you find were fired by the defendant, and the State does not have the burden of proving no justification in such circumstances." When combined, Shelton asserts that the jury was told he fired the fatal shot with no justification. The State counters that even if instruction No. 27 was an incorrect statement of the law, there was no prejudice to the defendant here as causation was not an issue in this case.

We agree with the State that although the instruction could have been worded better to say "the wound inflicted by Swigart," the error was harmless. As stated above in order to demonstrate prejudice, Shelton must show that this error resulted in his actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions. *Hill*, 449 N.W.2d at 628–29 (citing *Frady*, 456 U.S. at 170, 102 S. Ct. at 1595, 71 L. Ed. 2d at 832). Causation was not a central issue to the case. *Miles*, 344 N.W.2d at 235. There was no evidence at trial suggesting Shelton fired the fatal shot or that any shot fired by Shelton struck Masters. All of the marshalling instructions for the charged offenses state that Shelton aided and abetted another in the shooting Masters. *Id*. Finally, there is no indication that the result would have been different if the correct instruction was given. *Hopkins*, 576 N.W.2d at 379.

C. Failing to Challenge the Sufficiency of Evidence as to the Elements of Premeditation, Willfulness, and Malice Aforethought on Appeal. Shelton next claims his appellate counsel on direct appeal was ineffective for failing to challenge the sufficiency of evidence on the issue of his premeditation, willfulness and malice aforethought. At the close of the State's evidence, Shelton's trial counsel moved for a directed verdict of acquittal arguing there was no evidence of premeditation. On direct appeal, Shelton's attorney filed a motion for leave to withdraw under then Iowa Rule of Appellate Procedure 104[5] alleging that no legal basis for appeal could be found and that the appeal was frivolous. Specifically with respect to the sufficiency of evidence, former appellate counsel stated in his motion,

> [a] timely and adequate motion for judgment of acquittal was made after the State rested, but the trial evidence . . . clearly generated a jury question that Shelton aided and abetted in the murder of Masters and attempted murder of Kennedy.

When the sufficiency of evidence is challenged on appeal, this court reviews all the evidence "in the light most favorable to the State." *State v. McFadden*, 320 N.W.2d 608, 614 (Iowa 1982). The verdict is upheld if it is supported by substantial evidence. *Id*. Substantial evidence is evidence that could "convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Id*. As Shelton was charged with first-degree murder as an aider and abetter, the State was required to prove that Shelton acted with premeditation, willfulness, and malice aforethought or that he aided or abetted

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[5] Now Iowa Rule of Appellate Procedure 6.1005.

Swigart with the knowledge that Swigart acted with premeditation, willfulness, and malice aforethought. *State v. Wellborn*, 443 N.W.2d 72, 73 (Iowa Ct. App. 1989) (citing *State v. Kneedy*, 232 Iowa 21, 28, 3 N.W.2d 611, 615 (1942)).

Based on the record before us, we conclude substantial evidence exists to support the finding that Shelton acted with premeditation, willfulness, and malice aforethought or that he aided and abetted Swigart with the knowledge that he was acting with the requisite *mens rea*. Shelton exchanged heated words with Masters and Kennedy at their first interaction and then sped off spraying gravel on Masters's truck. The occupants of the vehicles then engaged in a game of "chicken" where Shelton swerved off the road. Next, Shelton retrieved his weapon from behind the seat, assembled and loaded it and handed it to Swigart saying, "we have to kill them before they kill us." *See State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003) (evidence of a quarrel between victim and defendant and the use of a deadly weapon may be used to infer malice aforethought and premeditation). *State v. Hofer*, 238 Iowa 820, 836, 28 N.W.2d 475, 483–84 (1947) (defining willful to mean intentional and not accidental).

Because we have found there was sufficient evidence from which the jury could have concluded Shelton acted with premeditation, willfulness, and malice aforethought, Shelton's appellate counsel did not breach an essential duty. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (asserting that counsel is not incompetent for failing to raise a meritless issue).

D. Failing to Challenge the Sufficiency of Evidence as to Prove Lack of Justification. Shelton next claims his trial and appellate counsel were

ineffective in failing to challenge the sufficiency of evidence with respect to the issue of justification. Again this court reviews all the evidence "in the light most favorable to the State" when a defendant makes a sufficiency of the evidence claim. *McFadden*, 320 N.W.2d at 614. The verdict is upheld if it is supported by substantial evidence. *Id*.

Once the defendant raises the issue of justification, the burden is on the State to prove beyond a reasonable doubt that the defendant was not acting with justification. *Thornton*, 498 N.W.2d at 673. The State can meet this burden by proving any one of five elements:

1. The Defendant started or continued the incident which resulted in death; or
2. An alternative course of action was available to the Defendant; or
3. The Defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save himself; or
4. The Defendant did not have reasonable grounds for the belief; or
5. The force used by the Defendant was unreasonable.

Id. As outlined above in subsection A, the State has asserted that it met its burden of proof with respect to Shelton's lack of justification. We find the State provided sufficient evidence for the issue of lack of justification to be submitted to the jury. Shelton's trial and appellate counsel did not breach an essential duty in failing to raise the issue of the sufficiency of the evidence to disprove justification. *Greene*, 592 N.W.2d at 29.

E. Filing a Defective Withdrawal Brief. In his final ineffective-assistance-of-counsel claim, Shelton asserts his counsel on direct appeal, Kermit

Dunahoo, was ineffective for filing a defective brief in support of his motion to withdraw. Iowa Rule of Appellate Procedure 6.1005 provides:

> If, after a diligent investigation of the entire record, court-appointed counsel is convinced the appeal is frivolous and that counsel cannot, in good conscience, proceed with the appeal, counsel may file a motion to withdraw. The motion must be accompanied by:
> a. A brief referring to anything in the record that might arguably support the appeal. The motion and brief shall be in the form specified in rule 6.1007.
> b. A copy of the rule 6.1005(3) notice
> c. A certificate showing service of the motion, brief, and notice upon the client and the attorney general.

Shelton argues that all appellate counsel did was argue against him in counsel's motion to withdraw and counsel stated that there was overwhelming evidence of guilt in this case. Shelton requests that this court reinstate his direct appeal. We find no defect in counsel's motion to withdraw.

The U.S. Supreme Court has held that appellate counsel is not ineffective for filing an appellate brief that addresses only why the appeal is meritless in support of a motion to withdraw from a frivolous appeal. *McCoy v. Wisconsin*, 486 U.S. 429, 440, 108 S. Ct. 1895, 1903, 100 L. Ed. 2d 440, 454–55 (1988). The U.S. Supreme Court noted that attorneys are obligated under the rules of ethics to disclose to the court facts and law that are contrary to his or her client's interests. *Id*. The purpose of the brief is to demonstrate to the court that counsel has in fact fully reviewed the record as required under the rule. *Id*. at 439, 108 S. Ct. at 1902, 100 L. Ed. 2d at 454.

Counsel's brief in this case adequately set out both the procedural history as well as the facts of the case before concluding that based on his review, there were no appealable issues. Shelton was given notice of the motion to withdraw

and given a copy of the brief. He was afforded an opportunity to resist, which he did. The Iowa Supreme Court then made an independent review of the record and found that the appeal was frivolous. In addition, the dismissal specifically reserved Shelton's right to make a claim for ineffective assistance of counsel.

Even if we were to find that appellate counsel was ineffective for filing a brief that only demonstrates why the appeal was frivolous, the remedy Shelton requests is unnecessary. Shelton seeks to have his direct appeal reinstated. Under section 814.7, ineffective assistance of counsel claims need not be raised on direct appeal in order to be properly preserved for postconviction relief. Iowa Code § 814.7 (2009). This statute, while not in effect when the direct appeal was prosecuted, has been held to have retroactive application and is thus applicable to Shelton's postconviction relief action. *Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007). Thus, Shelton has already been afforded an opportunity to have his claims addressed in the postconviction relief proceedings without the need for the direct appeal.

IV. STRIKING FORMER APPELLATE COUNSEL'S PROOF BRIEF. Shelton next requests in his pro se brief that this court take judicial notice of the proof brief filed by his former postconviction relief appellate counsel in this matter. This proof brief was stricken from the appellate record after Shelton's former appellate counsel, Rockne Cole, withdrew from representation. The State Appellate Defenders office was appointed appellate counsel in Mr. Cole's stead and filed an appellate brief on Shelton's behalf. In addition, Shelton filed his own pro se appellate brief and reply brief. Shelton was given the opportunity through

is pro se brief to present whatever argument he wanted to present. If his current appellate counsel failed to address issues he believes should be addressed by this court, he should have put these arguments in his pro se brief. The stricken proof brief of Shelton's former appellate counsel is not before this court and we deny the request to consider it.

IV. INNOCENCE. Shelton asserts that he is innocent of murder in the first degree and asks that this court dismiss the charge against him. Specifically, he asks this court to decide at what point his actions on the night in question turned from legal activity to unlawful criminal activity. To the extent that this argument seeks a review of the sufficiency of the evidence, Shelton is referred to our discussion above of on the claims of ineffective assistance of counsel in failing to challenge the sufficiency of evidence on premeditation, malice aforethought and willfulness, and lack of justification.

V. STATUTE OF LIMITATIONS. Shelton next requests in his pro se brief that he be excused from any violation of the statue of limitations in this case has he had been ordered by the district court on two occasions to stop filing pro se motions and directed to raise any issues through court appointed counsel only. In addition, Shelton asks that this court find the State abandoned or waived any statute of limitations argument by not properly raising the same at the postconviction relief trial. This claim is moot as the State has not argued that Shelton's claims are barred by any statute of limitations and therefore will not be addressed. *East Buchanan Tel. Coop v. Iowa Util. Bd.*, 738 N.W.2d 636, 640–41

(Iowa 2007) (holding that an appellate court only decides cases involving actual, justiciable controversy, not moot issues).

VI. MOTION TO CORRECT ILLEGAL SENTENCE. Finally, Shelton asks this court to make a specific ruling that his motion for correction of illegal sentence and brief and argument in support therein, filed August 12, 1992 in the district court, constituted an application for postconviction relief. We find the district court order dated August 25, 1992, makes it sufficiently clear that this motion, along with other various motions filed by Shelton pro se, were collectively treated as an application for postconviction relief. The district court ordered a second time on October 19, 1992, that all pending motions filed by Shelton are consolidated and to be considered by the court to be a single petition for postconviction relief. Because we find the district court made it abundantly clear that Shelton's motion for correction of illegal sentence constituted an application for postconviction relief, we find no need to do so here. *Id.*

VII. CONCLUSION. In this postconviction relief appeal, Shelton raised a number of claims based on ineffective assistance of counsel. We find no reversible error. We find that while the justification jury instruction was an incorrect statement of the law, the great weight of the evidence admitted at trial demonstrates no prejudice to Shelton. We also hold that there was no prejudice on the causation instruction because causation was not a central issue to the case. Based on the record before us, we conclude substantial evidence existed to support the finding that Shelton acted with premeditation, willfulness, malice aforethought, and without justification, thus counsel was not ineffective for failing

to raise the issue at trial or on direct appeal. Lastly, former appellate counsel on the direct appeal was not ineffective for filing a brief in support of his motion to withdraw that addressed only why the appeal is meritless. We refuse to take judicial note of the proof brief filed in this appeal by Shelton's former appellate counsel. Finally, we find that Shelton's requests that we waive any statute of limitations and rule his motion for correction of illegal sentence constituted an application for postconviction relief are moot.

AFFIRMED.