

IN THE COURT OF APPEALS OF IOWA

No. 1-800 / 10-0740
Filed November 23, 2011

RALEIGH BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton,
Judge.

A postconviction relief applicant contends that his attorneys rendered ineffective assistance in failing to properly challenge the sufficiency of the evidence to support his conviction. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald L. Feuerbach, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

Raleigh Brown was charged with and found guilty of first-degree burglary and other crimes in connection with his entry into his girlfriend's apartment and a subsequent assault. He appealed, raising several issues, including a claim that the evidence was insufficient to support the elements of first-degree burglary. His appellate attorney moved to withdraw pursuant to Iowa Rule of Appellate Procedure 6.104.¹ The Iowa Supreme Court granted the motion, concluding Brown's appeal was "frivolous."

Brown filed an application for postconviction relief, alleging in part that the State did not prove he lacked "permission or authority to remain in the residence," as the jury was instructed. See Iowa Code § 713.1 (2007) (defining the offense of burglary); *State v. Walker*, 600 N.W.2d 606, 609 (Iowa 1999) ("We hold that the victim need not expressly revoke his or her consent to the defendant's presence; it is sufficient that the victim's actions give the defendant reason to know that such consent has been withdrawn."). He asserted his trial attorney was ineffective in failing to raise this issue. The district court denied all of Brown's claims, including this one. The court reasoned that Brown's "right, license or privilege to be in the premises assertion was before the jury, and it rejected his defense."

On appeal, Brown reiterates that his trial attorney was ineffective in failing to challenge the sufficiency of the evidence on this element. The problem he

¹ This is currently Iowa Rule Appellate Procedure 6.1005(2). The rule allows court-appointed counsel to move to withdraw if counsel is convinced the appeal is frivolous and counsel cannot in good conscience proceed with the appeal.

faces is that his attorney in fact raised the issue. At trial, Brown's attorney moved for judgment of acquittal on the following ground:

First of all, with respect to Count 1, burglary in the first degree, one of the essential elements of any burglary is a lack of right, license or privilege to enter an occupied structure. Clearly there is substantial evidence from which a jury could find that there was a break-in to an occupied structure and possibly that there was the intent to commit an assault or other felony therein. However, focusing on the issue of right, license or privilege, there is no substantial evidence—indeed no evidence at all, from which a jury could reasonably conclude that there was no right, license or privilege.

See State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004) (“To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.”). The district court ruled that “there is substantial evidence to support the submission of burglary in the first degree upon a theory that the Defendant remained in the structure after his right, license, or privilege to do so had expired.” The burglary count was submitted to the jury solely on this theory and, as noted, the jury found against Brown. As Brown did not prevail on this challenge, he necessarily cannot prevail on an ineffective-assistance-of-counsel claim predicated on this challenge. *See State v. Hoskins*, 711 N.W.2d 720, 731 (Iowa 2006) (stating if a challenge to the sufficiency of the evidence would have proved unsuccessful, ineffective-assistance-of-counsel claim necessarily failed).

Brown also suggests his attorneys on direct appeal and in the postconviction relief proceeding were ineffective in failing to raise this issue. In the event he is asserting their ineffectiveness in an effort to preserve his

ineffective-assistance-of-trial-counsel claim, he no longer needs to do so. See Iowa Code § 814.7(1) (stating ineffective-assistance-of-counsel claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes). Alternatively, assuming his contention is that appellate counsel was ineffective in failing to raise the issue on the merits, his argument fails, as Brown's attorney on direct appeal raised the sufficiency-of-the-evidence question in connection with her motion to withdraw, specifically mentioning the need for proof that Brown's authority to remain in the apartment had been implicitly revoked. Brown's attorney in the postconviction relief proceedings also raised the issue and the district court addressed it.

In sum, Brown's attorney moved for acquittal on "the permission or authority to remain in the residence" element of burglary, the district court denied the motion and submitted this question to the jury, and the jury found against Brown, as was its prerogative based on the conflicting evidence on this question. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) (noting that it is the jury's function to determine whom to believe when conflicting testimony is presented and to assign weight to the evidence presented at trial). We will not second-guess that jury finding.

We affirm the district court's denial of Brown's application for postconviction relief.

AFFIRMED.