

IN THE COURT OF APPEALS OF IOWA

No. 1-808 / 10-1946
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THEODORE RAY BASCOM,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, Nancy A. Baumgartner, Judge.

A defendant appeals from his conviction for conviction of assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (2009).

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, David C. Thompson, County Attorney, and Jo Peterson and Emily Nydle, Assistant County Attorneys, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Theodore Bascom appeals from his conviction for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (2009). He raises an ineffective-assistance-of-counsel claim. Our review is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Although ineffective-assistance-of-counsel claims do not need to be raised on direct appeal, a defendant may do so if he has reasonable grounds to believe the record is adequate to address his claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If we determine the record is adequate, we resolve the claim. *Id.* If we determine the record is inadequate, we must preserve the claim for postconviction-relief proceedings, regardless of our view of the potential viability of the claim. *Id.*

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) his trial counsel failed to perform an essential duty, and (2) prejudice resulted from this failure. *Straw*, 709 N.W.2d at 133. A defendant's inability to prove either element is fatal and therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

The evidence at trial demonstrated that Bascom and the victim were essentially arguing over who knew more about prison life. Bascom admitted he punched the victim, but testified that it was in self defense. He also argued the sheriff's department did an inadequate investigation by only obtaining statements

from the victim and victim's girlfriend, and failing to obtain a statement from him before charging him with assault.

On appeal, Bascom asserts his trial counsel was ineffective for failing to object to the two references to the "active warrant for harassment." A Benton County deputy sheriff testified:

Q. Did you attempt to find the Defendant? A. I—he wasn't at the scene, obviously. We had put the information out. Apparently, the address that was given wasn't a good address, so we really didn't know where he was at. Obviously, I wanted to try to contact the Defendant, but we just had no way to do it that night. Like I said, we had sent Cedar Rapids officers, we had a state trooper assisting us, so we made attempts to find him. He just wasn't to be found.

Q. You said the address that wasn't right. Where did that address come from? A. That address would come from a driver's license or a state ID.

Q. So his address that Mr. Bascom had on his driver's license wasn't correct? A. No. And the reason the State likes to have a correct address is in case they need to notify you I don't know if it had something to do because he did have an active warrant for harassment on there and commonly if people are trying to avoid—

Q. Let's move on. Did anybody—any officer go to his place of employment in the days following this incident to try to find him? A. I didn't go there and I don't know to the full extent that Cedar Rapids continued to look for him.

Q. Did Trooper Schwinn go? A. I don't recall if he did go to his place of work or not. I know that he did know him, and he was going to keep looking for him.

Q. And? A. And he also had an active warrant so—

Q. Let's move on.

The Court: Counsel, approach.

(A discussion was held off the record.)

The jury was then excused and a short recess was held.

Normally ineffective-assistance-of-counsel claims are preserved for postconviction relief proceedings so that trial counsel has an opportunity to explain his conduct and performance. *State v. Slayton*, 417 N.W.2d 432, 436

(Iowa 1987). What is not clear from this record is whether trial counsel had a tactical reason for not objecting to the references to the warrant. See *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984) (“[A]n attorney’s decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. . . . When trial counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy does not achieve the desired result.”). The State argues the outstanding warrant actually supported the defense argument that the sheriff’s department conducted an inadequate investigation, explaining why the sheriff’s department assumed Bascom was the instigator of the fight and explaining why Bascom did not come forward and give a statement. Further, the record does not demonstrate what occurred during the discussion off the record and short recess immediately after the complained-of testimony. We therefore choose to preserve Bascom’s claim for postconviction relief proceedings. See *Johnson*, 784 N.W.2d at 198 (“If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court’s view of the potential viability of the claim.”). We affirm.

AFFIRMED.