IN THE COURT OF APPEALS OF IOWA

No. 6-772 / 05-1076
Filed December 13, 2006

GREG G. SCHOO,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wright County, Kurt L. Wilke, Judge.

Greg G. Schoo appeals the dismissal of his application for postconviction relief. **AFFIRMED.**

Michael Jacobsma of Jacobsma, Clabaugh & Freking, P.L.C., Sioux Center, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Eric Simonson, County Attorney, for appellee State.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Greg G. Schoo appeals the dismissal of his application for postconviction relief. He argues the district court erred when it found his trial counsel was not ineffective for (1) requesting the removal of jury instructions concerning lesser-included offenses and (2) failing to call the defendant and his sister as witnesses. Schoo also argues his postconviction relief counsel was ineffective for failing to present evidence concerning a witness's recantation. We affirm.

I. Background Facts and Proceedings

Early on August 31, 2002, Jesse Adams invited a group of people to attend an after-hours party at a residence after the bar where they had been socializing closed. Approximately twenty minutes after the party began, Schoo arrived at the residence. He walked into the living room, hit his ex-wife Jamie, then left immediately.

Schoo was charged with first-degree burglary. At trial his attorney requested that in addition to instructions on first-degree burglary the court instruct only on the lesser-included offenses of assault causing bodily injury and simple assault. The jury convicted Schoo of first-degree burglary, and he was sentenced to a twenty-five-year indeterminate term. His conviction was affirmed by this court. *See State v. Schoo*, No. 03-0999 (Iowa Ct. App. Sept. 29, 2004).

Schoo filed an application for postconviction relief. After a hearing, the district court denied his application. Schoo appeals.

II. Standard of Review

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the

petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Nguyen v. State,* 707 N.W.2d 317, 322-23 (Iowa 2005); *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998) (stating standard of review for postconviction counsel).

III. Merits

Schoo claims his trial attorney was ineffective in two ways. First, he claims his attorney should not have advised him to forgo instructing the jury on other lesser-included offenses. Second, he argues his trial attorney should have allowed him and his sister, Kay Dicke, to testify. Finally, Schoo argues his postconviction counsel was also ineffective in failing to present evidence concerning a witness's recantation.

In order to show his counsel was ineffective, Schoo must show both that his attorney failed in an essential duty and that the failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Miscalculated trial strategy and mistakes in judgment usually do not rise to the level of ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

A. Lesser-Included Offenses

At the postconviction relief hearing, when asked about his trial strategy, Schoo's attorney testified as follows:

> I can't remember for specific fact, but I would think I probably brought up the issue that this might be a good idea. And the same applied to the trespass charge because if we are going to submit the issue of trespass and if they found him guilty of trespass and assault, then that verdict could be challenged because that could constitute a burglary conviction and so we didn't want to give the

> State the opportunity to challenge a favorable verdict. By putting trespass in there would or could create that problem as well.
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> . . . .
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> It was kind of a—it was an all or nothing proposition. He and I did not want the jury to reach a compromise verdict by going to burglary second or burglary third. We wanted the jury to come down to an assault verdict. The defense was that he did commit an assault, find him guilty of assault, but give them one option on the issue of right, license or privilege or open to the public. Give them one shot at that. And if the case was not made, then the verdict would have to go down from a class B felony all the way down to a misdemeanor. That was a choice he and I made and we decided on that together.
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> . . . .
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> If you listened to all of those lesser included offenses that were taken out, you can see that the jury could potentially have had eight or nine choices so to speak, and one of my concerns, and I think Greg agreed with this, was that if you give them ten choices, you never know where on that continuum they may check a yes. And we wanted to stick with the theory of our case, which was there was some kind of implied consent or expressed consent for him to go in there or it was open to the public, and those are all requirements in the burglary second and third. And if you don't have it, you don't have it for any offense. And the only difference between the first and second is that in burglary second there is no one present. That's what makes it a less egregious offense. With burglary in the third there must be no one present and there must be no injury. There certainly was a house full of people. She certainly was injured and we never denied that. So it would have been pretty insulting to think the jury might select one of those two versus burglary in the first. So that's why we elected to delete those nonapplicable offenses and go all the way down to assault.

Further, when asked whether he consulted with Schoo before making the request to only instruct on some lesser-included offenses, he testified:

> Well, I discussed it as thoroughly as we needed to, to arrive at a mutual decision in doing it. It's not something that I would do without getting consent from my client.

The State concedes that Schoo's trial attorney was probably incorrect about the possibility of the State successfully appealing a verdict favorable to the defendant in order to convict on a higher offense. *See State v. Taft*, 506 N.W.2d

757, 761 (Iowa 1993) (stating that conviction of a lesser-included offense constitutes acquittal on the greater offense for double jeopardy purposes). However, the key to the attorney's strategy was that he did not believe the State proved Schoo trespassed. He therefore wanted to try to limit the number of options the jury had in convicting Schoo and prevent it from compromising on a verdict not supported by the evidence. The record shows Schoo agreed with the strategy at the time.[1] *See Hughes v. State*, 479 N.W.2d 616, 618 (Iowa Ct. App. 1991) ("Simply because [the petitioner] lost the gamble does not render his counsel ineffective."). In its postconviction ruling, the district court stated as follows:

> In regard to the issues of instructing on lesser-included offenses and calling Applicant and/or his sister to testify, the trial counsel's decisions were part of a trial strategy that had sound basis and were approved by Applicant at the time. Nothing presented indicates that the result of the trial would have been different had instructions on lesser-included offenses been given, or if Applicant and/or his sister had testified.

We conclude the attorney's tactical decision was reasonable under the circumstances and does not rise to the level of ineffective assistance.

B. Testimony of the Defendant and His Sister

Testimony at the postconviction relief hearing shows that Schoo's sister Dicke dropped Schoo off at the party, waited in the car while he went inside, then drove him away. According to Schoo's trial attorney:

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[1] THE COURT: Mr. Schoo, you're present in the courtroom, and I think probably it would be appropriate to ask you, number one, you heard what your attorney has said [about removing the lesser included charges], and he's discussed it with you? SCHOO: Yes.

THE COURT: And you are in agreement with this? SCHOO: Yes.

> [I]f he told this jury that he went in there and went out and his sister dropped him off and picked him up and drove away, it would look like a premeditated hit and run, and that would certainly sink his case. If he got up there and started testifying what he did that night, the State would have the right to cross-examine him about how he got there and left and it would tear him to shreds. So that was a major part of the discussion and decision for him not to testify.

The attorney also stated that Schoo was extremely angry with the prosecutor. He feared that on cross-examination the prosecutor would be able to elicit that anger and compromise Schoo's credibility. Further, he testified that neither Schoo nor Dicke wanted to testify about Dicke's participation that night because the prosecutor had threatened to charge Dicke with aiding and abetting.

Once again, the postconviction court found the strategy to have a "sound basis." We agree. Given (1) Schoo's feelings against the prosecutor and (2) the possibility that his and Dicke's testimony would introduce premeditation and implicate Dicke, the attorney's strategy to avoid their testimony is reasonable.

C. Witness Recantation

At the postconviction relief hearing, Dicke testified that another witness could provide testimony indicating other witnesses were smoking marijuana the night of the incident. However, Schoo fails to tell us how that testimony would necessarily help him, how the testimony would produce a different outcome at his trial, or even how such testimony is a recantation of a previous statement. For those reasons, we conclude his claim is not specific enough to be preserved for any further postconviction relief proceedings. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

The district court's ruling dismissing Schoo's application for postconviction relief is affirmed.

AFFIRMED.