

IN THE COURT OF APPEALS OF IOWA

No. 9-1000 / 08-1713
Filed February 10, 2010

JASON EDWARD NEAL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas Staskal,
Judge.

Jason Neal appeals from the district court's denial of his second
application for postconviction relief. **AFFIRMED.**

Jesse A. Macro Jr. of Gaudineer, Comito & George LLP, West Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant
County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

This appeal from the denial of Jason Neal's second application for postconviction relief requires us to consider again the retroactivity of *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), and the constitutional effectiveness of Neal's counsel at trial, on appeal, and on postconviction.

The facts of this case, as summarized on direct appeal from Neal's 2003 conviction for first-degree murder are as follows:

According to the State's version of events, David's mother left him in Neal's care while she was at work. Neal became angry at David because David wet his pants and punished David by spanking him with a wooden paddle. Neal became "extra angry" when he found David had also soiled his pants. As a result, Neal pushed David into a bathroom wall causing David to hit his head on the wall and the floor, rendering him unconscious. Neal then cleaned David up, dressed him, and placed him in bed. After David began vomiting and was having difficulty breathing, Neal summoned a neighbor for help.

At the neighbor's instruction, Neal summoned emergency assistance. He told paramedics he didn't know what happened to David. At the hospital, David's treating physician, Dr. Dawson, "specifically asked [Neal] if [David] had had any kind of trauma of any kind . . . including spanking and falling in [his questioning]." Neal denied any trauma and said he was baking a cake when he found David lying on his bed. After offering several versions, Neal told police he pushed David into the bathroom wall.

Dr. Dawson would later testify that David was unconscious upon arrival and exhibited retinal hemorrhaging, a classic symptom of a battered child. Physicians also noted two distinct impact injuries to the back of David's head. David also had significant bruising that extended from his lower back to the bottom of his back and covered both sides of his buttocks. Dr. Gerdes, a pediatric critical care specialist, opined that it was unlikely David would have been able to walk after sustaining such injuries. The physicians' consensus opinion was that David's injuries were contemporaneously inflicted.

A subsequent autopsy confirmed that David died from "blunt force trauma to the head." The coroner determined David's fatal injuries were caused by at least two separate impacts to the back of

his head. The coroner also noted a deep laceration to the back of David's ear, a large bruise above his right eye, defensive wounds on the back of his right hand, bruises around his neck, and considerable bruising on his buttocks that were so extensive "they actually occurred throughout the muscles of the buttock."

Neal pled not guilty, and the matter proceeded to jury trial. At trial Neal's version of events differed in significant details from the State's. He disputed the severity of the spanking by testifying he only struck David five or six times with a wooden paddle and did not intend to injure him. Neal also disputed the State's claim that David's head and buttocks injuries were contemporaneously inflicted. He testified that after spanking David, David walked from the bedroom to the bathroom while Neal went upstairs. Neal's testimony included the following:

Q. All right, So you're done spanking and you went upstairs with the paddle; is that right? A. Yes, I did.

Q. And you put it away? A. Yes.

Q. And then what did you do? A. And then I came back downstairs to go back into—

Q. And at that point what do you see when you come back downstairs? A. The bathroom door is open. David is standing there and he's not changing or anything like that. He's just—he's standing there.

...

Q. Did he respond to you at all? A. He didn't respond. He wasn't looking up or anything at me, and I kept—I said, "David," and then I guess as a reaction because I wasn't getting his attention like I wanted it, I pushed. I pushed David.

Q. With both hands? A. With both hands.

Q. Where did you push him on his body? A. Like in the chest area. It wasn't—when I pushed him, it wasn't meant to be a push like as hard as it was or like that. It was just—you know, looking back on it, I wish I would have grabbed him by the shoulders, you know, like some people do, but I just—it was a reaction. I pushed, and he went back into the wall. And after he went back into the wall—

Q. Well, let me ask you this: When you pushed him, was it your intent to push him into the wall? A. No. My intent wasn't for him to hit the wall. It's what happened.

Q. What part of his body hit the wall? A. Well, I didn't—I mean, I wasn't back there to see, but I know his back hit the wall and then the indentation, the back of his head hit the wall.

Neal also testified that he then picked David up, dressed him, and placed him in bed. When Neal later noticed David had vomited and was having trouble breathing, he summoned a neighbor for assistance.

In his motion for judgment of acquittal, Neal argued that the evidence was insufficient to establish that he acted with malice aforethought, an essential element of proof under both the State's premeditated and felony murder theories. The court rejected Neal's argument and submitted both theories of first-degree murder to the jury. The jury returned a [general] verdict finding Neal guilty of first-degree murder. Neal's posttrial motions were denied, and a judgment of conviction and sentence were entered accordingly.

State v. Neal, No. 03-0623 (Iowa Ct. App. July 28, 2004).

Neal now appeals from the denial of his second application for postconviction relief, arguing: (1) the district court erred in determining that *Heemstra* does not apply retroactively; (2) his trial co-counsel were ineffective for a number of reasons; and (3) his trial, appellate, and postconviction counsel were ineffective for failing to argue that child endangerment should merge into murder and therefore cannot serve as the predicate felony for felony murder.

II. Standard of Review

We review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To the extent Neal's argument involves the constitutional right to effective assistance of counsel, our review is de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007).

III. Retroactivity of *Heemstra*

Neal argues that the district court's conclusion that the Iowa Supreme Court's 2006 decision in *Heemstra* does not apply retroactively to his case violates his due process rights. See *Heemstra*, 721 N.W.2d at 558. In *Heemstra*, the supreme court found, "[I]f the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and

therefore cannot serve as the predicate felony for felony-murder purposes.” *Id.*

However, the *Heemstra* court went on to say:

The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.

Id.

The Iowa Supreme Court later decided in *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009), that its refusal to apply *Heemstra* retroactively did not violate federal due process. We find no reason to apply a different analysis in considering Neal’s constitutional due process claim. See *State v. James*, 393 N.W.2d 465, 466 (Iowa 1986) (stating “we interpret provisions in our constitution which are similar to those in the federal constitution as being identical in scope, import and purpose,” after noting the due process guarantees of the state constitution are identical to those of the federal constitution). Accordingly, we affirm the district court’s finding that *Heemstra* does not apply retroactively to Neal.

IV. Ineffective Assistance of Trial Counsel

We agree with the district court that Neal’s assertions of ineffective assistance of trial counsel are not preserved. See Iowa Code § 822.8 (2007) (“All grounds for relief available to an applicant under this chapter must be raised in the applicant’s original . . . application. Any ground . . . not raised . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately

raised in the original . . . application.”). However, like the district court, we have considered these claims and find them to be without merit.

In order to prove his trial counsel were ineffective, Neal must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). To establish the first prong of the test, Neal must show that his counsel did not act as a “reasonably competent practitioner” would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To satisfy the second prong, prejudice, Neal “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Taylor*, 352 N.W.2d at 684.

A. Prosecutorial Misconduct

Neal claims trial counsel were ineffective for failing to object to impermissible statements made by the prosecutor during closing argument. We agree with the district court that although some of the statements made by the prosecutor may have been improper, Neal cannot prove they prejudiced him in the context of the overwhelming weight of the evidence. “[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). The record overwhelmingly supports the jury’s conviction of Neal for first-degree murder.

B. Witness Preparation

Neal claims trial counsel were ineffective for failing to properly prepare his witnesses to refrain from stating he was in jail at the time of trial. There was already evidence in the record that Neal had been arrested. Therefore, the testimony of Neal's witnesses was cumulative, and Neal suffered no prejudice. *See State v. Moeller*, 589 N.W.2d 53, 55 (Iowa 1997). Further, given the overwhelming nature of the evidence against Neal, he cannot prove he was prejudiced as required by *Strickland*.

Neal also claims trial counsel were ineffective for failing to properly prepare his expert witness for trial. Neal asserts his expert witness did not offer anything material to support his case and instead surprised counsel with damaging testimony. A review of the record reveals Neal's expert witness's testimony was helpful to his defense, most notably by lending credibility to Neal's version of the facts. In evaluating counsel's effectiveness, we require more than a showing that counsel's strategy was not completely successful. *Taylor*, 352 N.W.2d at 684. Neal cannot show his counsel were ineffective in their preparation of Neal's expert witness.

C. Admission of Photographs

Next, Neal argues his counsel were ineffective for failing to object to the number and cumulative nature of the photographs admitted at trial. The strength of the evidence supporting Neal's conviction compels us to conclude Neal is unable to show prejudice. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-70.

D. Merger of Child Endangerment and Murder

Finally, Neal argues his trial, appellate, and postconviction counsel were ineffective for failing to argue that when the crime of child endangerment is the same act that causes the victim's death, the child endangerment conviction and sentence merge into the murder and therefore cannot serve as the predicate felony for felony murder purposes. This argument was not presented to or decided by the district court. Accordingly, it is not preserved, and we decline to address it on appeal. 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.").

AFFIRMED.