

IN THE COURT OF APPEALS OF IOWA

No. 9-427 / 08-1150
Filed July 2, 2009

MARK WAYNE GEAR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Carl D. Baker,
Judge.

Applicant appeals following the district court's denial of his application for
postconviction relief. **AFFIRMED.**

John J. Haney of Hinshaw, Danielson, Kloberdanz & Haney, P.C.,
Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett and Douglas
Hammerand, Assistant Attorney Generals, and Randall J. Tilton, County
Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Mark Gear appeals following the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

Gear was convicted of attempted murder in violation of Iowa Code section 707.11 (2001) in January 2002. On direct appeal, this court summarized the facts leading to Gear's conviction as follows:

In the late evening hours of August 18, 2001, Tony Silvey went to Brewsky's Lounge in Iowa Falls. After drinking and socializing for a time, he went to the bathroom. Silvey heard someone enter the bathroom behind him and say, "Remember me, old man?" Silvey turned and saw Mark Gear

. . . Silvey stated, "I'll be right with you." Silvey finished at the urinal and turned to approach Gear. A man then entered the bathroom and Gear told him to leave. Now alone again with Silvey, Gear, with a beer bottle in hand, swung and struck Silvey on the side of the neck shattering the bottle. Silvey reacted by grabbing Gear by the hair and shoving him against the wall in an attempt to subdue him. At some point, Gear began wielding a knife and stabbed Silvey several times. When another man entered the bathroom, Gear fled with the knife.

State v. Gear, No. 02-0071 (Iowa Ct. App. Mar. 26, 2003). We affirmed Gear's conviction, determining substantial evidence supported the jury's finding that Gear attempted to murder Silvey and rejecting an ineffective-assistance-of-counsel claim. *Id.*

Gear filed an application for postconviction relief on April 22, 2004. In that application, Gear argued his trial counsel was ineffective in several respects, including his alleged failure to investigate and assert insanity and diminished responsibility defenses based on Gear's mental health and intoxication. At the hearing on his application, Gear testified that in the days before his fight with

Silvey, he “was on methamphetamine and drunk out of my mind I was hallucinating by then.” He further testified that he was diagnosed with “explosive behavioral disorder, major depression, and ADHD” in 1995, and that after his conviction, he was additionally diagnosed with “Huntington’s chorea” and “bipolar.” Gear did not present any medical records or expert testimony to support his testimony regarding these diagnoses.

Following the hearing, the district court denied the postconviction application in a detailed written ruling. Gear appeals. He claims the court erred in finding he did not receive ineffective assistance of counsel and denying his application for postconviction relief. He argues his trial counsel was ineffective for failing to explore defenses based on his “severe mental health condition, as well as alcohol and drug use.”¹

II. Scope and Standards of Review.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). When the applicant asserts a claim of constitutional nature, such as ineffective assistance of trial counsel, we evaluate the totality of the circumstances in a de novo review. *Id.*

¹ Gear additionally asserts his trial counsel was ineffective for failing to secure a medical expert to testify “that the injuries to the victim were not life threatening . . . in addition to showing his use of the knife was defensive in nature.” The district court did not address this issue in its ruling denying Gear’s postconviction application, and Gear did not ask the court to enlarge or expand its findings and rulings following trial. Therefore, error was not preserved. See *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (“[W]e will not consider a substantive or procedural issue for the first time on appeal”); *Starling v. State*, 328 N.W.2d 338, 341 (Iowa Ct. App. 1982) (stating a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) is essential to preserve error when a “trial court fails to resolve an issue, claim, defense or legal theory properly submitted for adjudication”).

III. Discussion.

In order to establish his trial counsel was ineffective, Gear 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). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

The test we employ for the first element is objective: whether counsel's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996). We start with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. 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).

The record shows that Gear's trial counsel, James Beres, was aware of Gear's mental health history and substance abuse but decided not to pursue defenses based on those conditions. Beres explained that Gear

never expressed any lack of memory for the events that happened . . . with Tony Silvey. He never expressed any confusion. He never reported any—any delusions about it. He never—really, he always presented it fairly straight forwardly as a case of self-defense.

. . . .

He did not report to me that he was using methamphetamine on the day of the fight at the bar in Brewsky's And once again he never reported to me any symptoms of mental illness that day. His memory of events was very clear.

. . . .

. . . I mean, he's reporting to me that he has ADHD, ADD, explosive behavioral disorder and depression. You know, he's not

reporting that he's schizophrenic. He's not reporting that he's delusional. He's not reporting that he has any lapses of memory. . . . He's not reporting anything at all that would be consistent with an inability to form a specific intent.

In order to establish a defense based on insanity, Beres would have had to prove that at the time of the crime, Gear suffered from "such a diseased or deranged condition of the mind" as to render him "incapable of knowing the nature and quality of the act [he] is committing or incapable of distinguishing between right and wrong in relation to that act." Iowa Code § 701.4. Gear presented no evidence supporting the viability of such a defense at the hearing on his postconviction application. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) ("[C]ounsel has no duty to raise an issue that has no merit."); see also *Anfinson v. State*, 758 N.W.2d 496, 502 (Iowa 2008) (determining attorney did not breach a duty in failing to investigate or present an insanity defense based on postpartum depression because defendant did not present any evidence at the postconviction hearing supporting that defense).

Gear likewise presented no evidence aside from his self-serving testimony regarding his mental health history and intoxication that would support a diminished responsibility defense. See *Anfinson*, 758 N.W.2d at 502 ("The diminished responsibility defense allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect she did not have the capacity to form that specific intent."). The mere fact that Gear had past mental health diagnoses and used methamphetamine in the days preceding his fight with Silvey does not mean he was incapable of forming the requisite intent for attempted murder. See, e.g., *Pettes v. State*, 418 N.W.2d 53, 55, 57 (Iowa

1988) (rejecting ineffective-assistance-of-counsel claim where trial counsel chose not to assert a diminished responsibility defense based on defendant's diagnosis of "adult situational stress with moderately severe depression"). As Beres testified, Gear gave him no reason to believe "that he was suffering from a mental illness at [the time of the offense], that he didn't have a clear memory of what happened and that he had any difficulty forming a specific intent." See *State v. Stewart*, 445 N.W.2d 418, 421 (Iowa Ct. App. 1989) ("In assessing the reasonableness of an attorney's action we consider the attorney's actions may be determined or substantially influenced by defendant's own statements or actions.").

Furthermore, counsel's duty to investigate is not limitless and is partly judged by the theory of defense chosen. *Schrier v. State*, 347 N.W.2d 657, 662-63 (Iowa 1984). "[R]easonable strategic considerations may justify the rejection of one theory of defense in favor of another theory reasonably perceived by counsel to be in the accused's best interest." *Anfinson*, 758 N.W.2d at 501. Beres testified that after conferring with Gear, he chose to concentrate on Gear's assertion that he was acting in self-defense, which he explained would have been a "complete defense if the jury [had bought] it." See *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984) ("Justification is a complete defense."). The defense of diminished responsibility, on the other hand, is only relevant to the element of specific intent. *Id.* at 18-19. Beres additionally testified that in his experience, juries did not always respond favorably to intoxication defenses. See *Pettes*, 418 N.W.2d at 56-57 (citing counsel's prior lack of success in asserting diminished

responsibility defenses in finding counsel performed within the range of normal competency).

In light of the foregoing, we believe counsel's decision to present a justification defense was a reasonable one based on trial strategy, which we will not interfere with simply because the chosen strategy did not achieve the desired result. See *Wilkins*, 346 N.W.2d at 18 (counsel not ineffective in making sound tactical decision to emphasize self-defense rather than diminished capacity). We therefore conclude Beres did not fail in an essential duty to his client in eschewing defenses based on Gear's mental state or intoxication.

We deny Gear's related claim that evidence of his mental state would have supported the justification defense he presented at trial. Gear relies on our supreme court's recent decision in *Anfinson* in arguing that such evidence would have "assisted the fact finder in understanding the circumstance as seen by Gear at the time of the incident, taking into consideration his mental state." 758 N.W.2d at 505 (finding counsel performed deficiently in failing to investigate and present evidence of defendant's postpartum depression because that evidence would have supported defendant's accidental death theory). However, unlike the postconviction applicant in *Anfinson*, Gear has presented no evidence—expert or otherwise—in support of his assertion that evidence of his mental condition would have explained his actions in fighting with Silvey. See *id.* at 500, 504 (detailing expert and lay testimony presented by applicant in support of her claim).

IV. Conclusion.

We conclude Gear did not show his trial counsel failed to perform an essential duty in not investigating and asserting defenses based on Gear's mental health and intoxication. We therefore affirm the judgment of the district court denying the application for postconviction relief.

AFFIRMED.