

IN THE COURT OF APPEALS OF IOWA

No. 9-807 / 09-0275
Filed November 12, 2009

MICHAEL GUNTHER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin,
Judge.

Michael Gunther appeals the denial of his application for postconviction
relief. **AFFIRMED.**

Susan Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, Matthew Wilber, County Attorney, and Margaret Popp Reyes, Assistant
County Attorney, for appellee State.

Considered by Vogel, P.J., Mansfield, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MANSFIELD, J.

Michael Gunther was convicted of second-degree murder. Iowa Code § 707.3 (2003). Two years ago, we affirmed his conviction. *State v. Gunther*, No. 06-0018 (Iowa Ct. App. Mar. 28, 2007). Gunther now appeals the denial of his application for postconviction relief. In that application, he contends his former appellate counsel was ineffective for not raising an alleged assault by one juror upon another that occurred during deliberations. Gunther also contends his former trial counsel was ineffective for not objecting at trial to hearsay testimony regarding statements by the murder victim. For the reasons set forth herein, we affirm.

I. Facts and Procedural Background.

Because we described the relevant facts in our prior opinion, we will summarize them more briefly here. Gunther had an intimate relationship with Sally Kennedy, and also became the manager of a traveling carnival she owned known as Blue's Amusements. Late in May 2004, Kennedy decided to break off both relationships. Gunther moved out of Kennedy's trailer, which was located at Bluffs Run RV Park in Council Bluffs, and made plans to return to Chicago.

On Sunday, May 23, Kennedy and Gunther attended the high school graduation of Kennedy's daughter, Samantha. Following the ceremony, the three of them went to the Spaghetti Works restaurant in Omaha, along with two other people. Samantha knew from her mother that Gunther was going to be leaving the carnival business. She described Gunther as "agitated." Kennedy told the others she wanted to lie down for a while, and she left the restaurant with Gunther. That was the last time Samantha saw her mother alive.

Around 7:50 p.m. on the 23rd, Gunther was recorded on surveillance video driving up to Kennedy's trailer. Gunther testified that he went into the trailer to pack up his stuff, and that Kennedy was there and asked him to stay. Gunther claimed he told her he could not stay, and Kennedy then started talking about other men she had been sleeping with, including Michael Zawodny, an employee of the carnival. According to Gunther, Kennedy commented that at least these other men did not have to take pills to have an erection. Gunther testified that he then called Kennedy by the first name of his ex-wife, and that Kennedy started punching him. Gunther testified that he did not remember anything after that. According to surveillance video, Gunther left Bluffs Run RV Park around 8:05 p.m. Gunther apparently headed for the carnival, which was located across the Missouri River in Bellevue, Nebraska.

Christopher Davis, who was the head of maintenance for the carnival, remembered having a brief conversation with Gunther about a mechanical issue with one of the rides. Less than a minute later, Davis heard shots. He ran to see what was happening, and came upon Gunther emptying the clip of his handgun on Zawodny, who was lying on the ground already dead. Gunther said, "This is the motherf_____ that's been f_____ Sally." Gunther also put the gun, with its clip now empty, to his own head and said, "I'm dead, Sally's dead, and now he is f_____ dead." Several bystanders tackled Gunther. It turned out that he had two handguns on his possession, both of which belonged to Kennedy.

At the time of his arrest, Gunther had blood on his clothing and a large cut on one finger. Police entered Kennedy's trailer that evening and discovered her lying face down in a pool of blood. She had been stabbed twenty-two times. A

bloody folding knife was left on the bathroom sink. Band-Aid wrappers were found on the floor. In Kennedy's bedroom, the officers found two empty, open gun cases. DNA testing was able to trace Gunther's blood to the trailer, and Kennedy's blood to Gunther's clothing. Gunther also gave a recorded telephone interview to a local Omaha T.V. station where he admitted killing both Zawodny and Kennedy.

Gunther was prosecuted in Nebraska for Zawodny's death. He chose to represent himself, was convicted of first-degree murder, and was sentenced to life imprisonment without the possibility of parole. *State v. Gunther*, 716 N.W.2d 691, 706 (Neb. 2006). Following his conviction on the Nebraska charges, Gunther went to trial in Pottawattamie County for Kennedy's death. Here, too, Gunther was charged with first-degree murder. Trial commenced on December 6. Gunther was represented by appointed counsel. Gunther's trial strategy was not to dispute that he had stabbed Kennedy to death; rather, he attempted to persuade the jury that the evidence warranted no more than a manslaughter conviction.

Samantha Kennedy was the State's first witness and, at times, testified without objection regarding discussions with her late mother. When asked how it came about that Gunther and Sally Kennedy ended their personal and business relationships, Samantha said, "[H]e wasn't being honest about the business, and—and she—she was tired of him lying and stealing and not being honest." Samantha also testified that her mother told her to keep Gunther's impending departure quiet because "Gunther didn't want all the employees to know about it."

Two friends of Sally Kennedy also testified, without objection, that they had conversations with Kennedy before May 23 where she said she was ending the relationship with Gunther. For example, one of these witnesses testified that Kennedy was “frustrated because he had been putting pressure on her and accusing her of having an affair . . . she felt like she had been mistaken in starting a relationship with him because of the way he was treating her”

The case went to the jury for deliberations on the morning of December 8. The jury was instructed on first-degree murder, as well as on the lesser-included offenses of second-degree murder and manslaughter. At 2:30 p.m., a note was sent to the court asking it to define “willful.” The court told the jury that the answer was in the jury instructions and that they should review them. At some point during that first day of deliberations, one female juror apparently struck another female juror. This was reported to the court attendant, although no contemporaneous record was made of the incident.

When the jury resumed their deliberations the next morning, December 9, the court gave the jurors a supplemental instruction, which was essentially a restatement of Iowa Criminal Jury Instruction 100.18, except the first sentence regarding selection of a foreperson was omitted.¹ Thus, the supplemental instruction began, “Your foreperson shall see that your deliberations are carried on in an orderly manner, that the issues are fully and freely discussed, and that every juror is given an opportunity to express his or her views. . . .” At 3:17 p.m., the jury sent a note asking, “If the vote is not unanimous for murder in the 1st

¹ Iowa Criminal Jury Instruction 100.18 had been given in its entirety prior to the commencement of deliberations.

degree, do we go on to murder in the second degree and vote on those elements.” The court again told the jury that its instructions contained the answer, and that they should review them. Shortly before 5 p.m., the jury returned a guilty verdict of murder in the second degree. The jurors were polled individually, and each indicated that it was his/her verdict.

Subsequently, Gunther moved for a new trial. His motion raised several arguments, including a claim of juror misconduct. This claim was supported by the following juror affidavit:

I was a member of the jury in the above captioned case. While serving on the jury, I was hit by a juror [name omitted] and threatened by another juror [name omitted]. As a result I don't believe I gave full consideration to the case because I was preoccupied with what the other jurors might do if I continued to voice my belief and understanding of the evidence presented. I was told on numerous occasions that since there were 11 of them against me I had to see it their way.

An evidentiary hearing was held at which this juror testified. She explained:

A couple hours after we were in deliberations, another juror [name omitted] punched me as, “What do you think about that? I hit you. What are you going to do about it?” I thought about doing something, and I thought no, I wasn't going to do anything. Well, you know, and then I notified [the court attendant] the next morning.

This juror went on:

[A]t that point, I was still pretty sure it was manslaughter at best. And after she hit me, I thought, well, they are never going to go—they would never settle for manslaughter. And a couple other people that were with me, they changed their minds too.

This juror also related that the juror who had struck her told everyone at the onset of deliberations, “My ex-husband stabbed me and left me for dead I want this son-of-a-bitch to pay for it.”

A male juror also testified at the evidentiary hearing. He confirmed that the affiant had been hit by another female juror, but he placed the event in a different context. He said that the other juror was simply illustrating the difference between accidental and willful contact. He added, “[I]t could have been deemed as intimidating, but I didn’t take it that way personally.” This male juror confirmed that the other female juror had made a comment to the effect that she had been stabbed by her ex-husband. He also testified that the forewoman at some point put her hands on the shoulders of the female juror who had been hit, and told her to calm down, that everyone needed to deliberate.

At the conclusion of the hearing, the district court overruled the motion for new trial. The court appeared to accept the male juror’s version of the incident, and also found that the incident was not calculated to, and with reasonable probability did not, influence the verdict:

[The] evidence presented this morning doesn’t rise to the level of an assault . . . , although I heard [the affiant’s] testimony. But I also am well aware of what was reported to the court attendant during deliberations, and heard [the male juror’s] testimony.

But the third prong of the three conditions are that it must appear that the conduct was calculated to and with reasonable probability did influence the verdict. And, again, I heard the testimony of the [affiant], but I don’t find there is sufficient evidence present to actually support a conclusion that the—whatever misconduct may have occurred, if any, was calculated to and actually did influence the verdict.

Gunther was sentenced to fifty years in prison on the second-degree murder conviction. He must serve seventy percent of that sentence before being eligible for parole.

On direct appeal, Gunther was represented by different counsel. That counsel did not raise the juror misconduct issue. As we have previously noted, Gunther's conviction and sentence were affirmed by our court, and the supreme court denied further review. Thereafter, Gunther filed the present application for postconviction relief.

In his application for postconviction relief, Gunther argued that his former appellate counsel was ineffective for not raising the juror misconduct claim, and that his former trial counsel was ineffective for not objecting to the hearsay testimony of Kennedy's daughter and friends concerning statements purportedly made by Kennedy about Gunther. Depositions of both former counsel were taken and submitted to the district court. In his deposition, appellate counsel testified he could not recall why the juror misconduct issue was not raised.

Gunther's former trial counsel, by contrast, remembered why he had not objected to certain testimony. He testified that he did not really view this testimony as harmful to the defense. His strategy with Samantha had been to demonstrate her bias, because among other things Gunther had fired her boyfriend (a former worker at the carnival). He also tried to show that Samantha did not know the full story about her mother's relations with Gunther. Thus, trial counsel got Samantha to admit that on May 23, even though the breakup had already occurred, Gunther was still with Kennedy the whole day and bought flowers for Samantha's graduation. Generally, however, Gunther's trial counsel testified that he wanted to tread lightly because Samantha had lost her mother and was "very tearful and crying when she was doing her testimony." Trial counsel also testified that he was not especially concerned about the friends'

testimony, since it was clear they did not know the details of the Gunther-Kennedy relationship.

The district court denied Gunther's petition for postconviction relief, holding that he had not demonstrated that either counsel had failed to perform an essential duty or that he was prejudiced thereby. This appeal followed.

II. Analysis.

Postconviction relief proceedings are law actions ordinarily reviewed for correction of errors at law. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). However, ineffective assistance of counsel claims are constitutional in nature, and therefore are reviewed de novo. *Id.*

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate: (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish the first prong, the defendant must show that counsel's performance was "below the standard demanded of a reasonably competent attorney." *Id.* To prove prejudice, the defendant must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 143 (quoting *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

We judge ineffective assistance of appellate counsel claims against the same two-pronged test utilized for ineffective assistance of trial counsel claims.

Ledezma, 626 N.W.2d at 141. To prove appellate counsel's deficient performance resulted in prejudice, the applicant must show his juror misconduct claim would have prevailed if it had been raised on direct appeal. *Id.*

A. Juror Misconduct.

Gunther argues his appellate counsel was constitutionally ineffective for not raising the alleged incident of juror misconduct on direct appeal. Although the State argues, and the district court found, that Gunther's appellate counsel made a reasonable strategic decision not to raise the issue, we do not rely upon this ground for affirmance. Since counsel could not recall *why* he did not raise the issue, and the after-the-fact strategic justification that has been offered is not compelling to us,² we will not assume that it existed at the time.

However, we do not believe Gunther was prejudiced because a direct appeal on this issue would not ultimately have been successful. To impeach a verdict based on jury misconduct, three conditions must be met. First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation. Third, it must appear—independent of what jurors might later say—that the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Cullen*, 357 N.W.2d 24, 27-29 (Iowa 1984).

² The suggestion was made below that Gunther's appellate counsel went through the normal process of triage and decided to raise only the most meritorious issues on direct appeal. However, it is not clear to us that the juror misconduct issue has less merit than the issues that were raised, such as the district court's decision to admit certain limited evidence of the Zawodny shooting.

District courts have broad discretion in ruling on these matters. *State v. Wells*, 437 N.W.2d 575, 581 (Iowa 1989); *Cullen*, 357 N.W.2d at 27-29. In exercising that discretion, trial courts properly can “examine the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented.” *State v. Johnson*, 445 N.W.2d 337, 342 (Iowa 1989) (quoting *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983)). “A trial court has broad discretion in matters involving alleged jury misconduct, and an abuse of that discretion will not be found unless the action of the trial court is clearly unreasonable under the circumstances.” *State v. Powell*, 400 N.W.2d 562, 565 (Iowa 1987).

Had one juror assaulted another in an intimidating manner, we have no doubt that the first two conditions would be met. However, the district court, which had the opportunity to evaluate the credibility of the juror witnesses before it, apparently found the other version of events more believable. The court, in other words, concluded that the “assault” was in fact a demonstration of the difference between “willful” and “accidental.”³ The record confirms that a question about the meaning of “willful” arose during the first day of deliberations. The jury asked the judge a written question about it.

Most importantly, the district court found that the third condition had not been met, and we see no basis for disturbing that conclusion. After the alleged assault occurred sometime on December 8, the jury retired for the day, returned the next morning and deliberated until 3:17 p.m., at which point they told the

³ Proof that Gunther either (a) willfully, deliberately, and with premeditation killed Kennedy or (b) committed a willful injury (under the law as it then existed) would have supported a first-degree murder conviction. See Iowa Code §§ 707.2, 708.4.

court that they were “not unanimous for murder in the 1st degree.” The court told the jury to follow the instructions and keep deliberating. Less than two hours later they returned a guilty verdict for second-degree murder. All jurors were polled individually, including the one who provided the subsequent affidavit, and all attested that this was their verdict. Thus, if anything, it appears that any effects of the prior day’s incident had over twenty-four hours to dissipate, and that a group of jurors who favored a first-degree murder verdict were actually talked into accepting a lesser verdict.

Furthermore, as we noted in the prior appeal, there was “overwhelming record evidence from which a rational jury could find Gunther guilty of second-degree murder.” Gunther stabbed Kennedy twenty-two times. He then had sufficient presence of mind to get a Band-Aid for his finger, remove Kennedy’s handguns from their cases, drive to Bellevue, Nebraska, talk to a coworker about a mechanical problem with a carnival ride, and then empty one of those guns on Zawodny. Gunther tried to persuade the jury he had no recollection of these events, although he had sufficient recollection at the time to tell a news reporter in a recorded conversation he had killed both Kennedy and Zawodny. For these reasons, we conclude there is no reasonable likelihood that the outcome of Gunther’s direct appeal would have been different if he had raised the juror misconduct issue.

B. Hearsay and Prior Bad Acts.

Gunther also argues that his trial counsel was ineffective for failing to object to hearsay, including testimony from Kennedy’s daughter that Kennedy

was “tired of [Gunther] lying and stealing and not being honest.”⁴ We agree with the district court that Gunther’s trial counsel did not fail to perform an essential duty in failing to object to this testimony. To return a voluntary manslaughter verdict, a jury was going to have to be convinced that Gunther acted solely by reason of sudden, violent and irresistible passion resulting from serious provocation. See Iowa Code § 707.4. Thus, Gunther’s trial counsel made a reasonable judgment that he needed to portray this case as a situation where Sally Kennedy had strongly ambivalent feelings about Gunther. According to this defense theory, Kennedy both loved the defendant and hated him. Evidence that Sally Kennedy told her daughter and her friends she wanted Gunther to leave and was tired of his behavior was by no means inconsistent with this defense. As part of this defense strategy, Gunther’s trial counsel also attempted to show that these witnesses were not close enough to the couple to see the “love” side of the purported love-hate relationship.

In any event, Gunther has not established that he was prejudiced by this testimony in that there is a reasonable probability the outcome would have been different. This case involved two brutal slayings. As we previously stated, there was “overwhelming record evidence” to support a second-degree murder verdict. Gunther’s performance on the stand, where he remembered many petty business disagreements but claimed not to have any recollection of the slayings themselves, also may not have found favor with the jury. Gunther himself acknowledged that some days before he killed Kennedy, she had asked him to

⁴ Gunther characterizes this particular testimony as presenting not only hearsay but also Iowa Rule of Evidence 404(b) “bad acts” evidence. Regardless, for the reasons stated herein, we conclude Gunther’s trial counsel was not ineffective in failing to object to it.

leave. Placed in that context, we are convinced that the fairly limited testimony from Kennedy's daughter and friends about the *reasons* why Kennedy supposedly wanted Gunther to leave could not have affected the outcome of the trial.

III. Conclusion.

For the foregoing reasons, we affirm the denial of Gunther's application for postconviction relief.

AFFIRMED.