IN THE COURT OF APPEALS OF IOWA

No. 9-813 / 09-0448
Filed November 12, 2009

MARK EMERSON WILLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jackson County, Charles H. Pelton, Judge.

Mark Willey appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Mark Willey, Anamosa, pro se.

Thomas J. Miller, Attorney General, Mary E. Tabor and James E. Kivi, Assistant Attorneys General, and Chris Raker, County Attorney, for appellee State.

Considered by Potterfield, P.J., Mansfield, J., and Mahan, S.J.*

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

POTTERFIELD, P.J.

I. Background Facts and Proceedings

The facts of this case, as summarized on direct appeal, are as follows:

> [Mark] Willey's sister, Emelie Harmon, ended her shift at work at nine o'clock in the morning and walked home. Upon arriving home, she unlocked and opened the back doors, and stood in the doorway trying to coax her cat into the house. As Harmon was standing in the doorway, Willey jumped out of the butler's pantry in the kitchen and rushed at Harmon, pointing a stun gun towards her head. Harmon attempted to flee but was attacked by Willey on the patio outside the back door. Willey stabbed Harmon multiple times, covered her with a tarp, then took her keys and locked her house. Harmon made her way to the street where a motorist stopped to assist. After being driven by ambulance to a nearby emergency room, Harmon was taken by air ambulance to the University Hospital in Iowa City. Shortly after the incident occurred, Willey was arrested. He had a knife in his pocket and was carrying a bag that contained a stun gun, Harmon's keys, a screwdriver, a pry bar, rope, plastic wrap, and other incriminating items. Willey also had multiple bloodstains on his clothes.
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> Willey was charged with attempted murder, burglary, and willful injury causing serious injury. He pled not guilty and the case went to trial. The jury found Willey guilty of the lesser-included offense of assault with intent to inflict serious injury in violation of Iowa Code section 708.2(1) (2005), first-degree burglary in violation of section 713.3, and willful injury causing serious injury in violation of section 708.4(1). After merging assault with intent to inflict serious injury with willful injury causing serious injury, the district court sentenced Willey to consecutive sentences of twenty-five years on the burglary conviction and ten years on the willful injury conviction.

State v. Willey (*Willey I*), No. 06-1232 (Iowa Ct. App. Sept. 19, 2007).

This court affirmed Willey's convictions, holding that there was sufficient evidence to sustain a conviction on both the first-degree burglary and willful injury causing serious injury charges and that the district court did not err in declining to instruct the jury on self-defense. *Id.* In December of 2007, Willey filed a motion for resentencing, contending his conviction for willful injury causing serious injury

should have been merged with his conviction for first-degree burglary. The district court denied his motions, and he appealed to this court, which affirmed his convictions and sentencing. *See State v. Willey* (*Willey II*), No. 08-0241 (Iowa Ct. App. Dec. 31, 2008). On May 23, 2008, Willey filed an application for postconviction relief, asserting error on twenty-two grounds. The district court denied Willey's application for postconviction relief. Willey now appeals, asserting as error the same twenty-two grounds, which we address below.

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 that Willey'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).

In order to prove that his counsel was ineffective, Willey must show that: (1) his 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). In order to establish the first prong of the test, Willey 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). In evaluating counsel's effectiveness, we require more than a showing that counsel's strategy failed. *Taylor*, 352 N.W.2d at 684. In addition, there is a strong presumption that counsel performed competently. *Id*. To satisfy the second prong, prejudice, Willey "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." *Id.* If we can

dispose of Willey's claim under the prejudice prong, we need not evaluate his counsel's performance. *Id.*

III. First-Degree Burglary

Willey argues the first-degree burglary statute requires injury inside an occupied structure, which he asserts did not happen in this case because he caused the injuries on the patio. Willey also asserts his trial counsel was ineffective for failing to object to a sentence based on an assault that he contends occurred outside the occupied structure when the Iowa Code requires the assault to occur inside the structure and for failing to object to certain jury instructions when no weapon was ever used inside the occupied structure. Willey, however, misinterprets the Iowa Code, which defines first-degree burglary as follows:

> A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply:
>
> . . . .
>
> b. The person has possession of a dangerous weapon.
>
> c. The person intentionally or recklessly inflicts bodily injury on any person.

Iowa Code § 713.3 (2005). Thus, to prove first-degree burglary, the State did not have to prove an injury occurred inside an occupied structure, or at all, if it proved Willey had possession of a dangerous weapon during the perpetration of a burglary in an occupied structure in which one or more persons were present.

This court previously considered whether Harmon was present in the house and whether Willey was armed with a dangerous weapon. *See Willey I*. We concluded sufficient evidence supported the jury's finding that Harmon was in

her home and that Willey possessed a dangerous weapon in her home. *Id.* Because these issues were raised and decided in prior proceedings, they cannot be relitigated in this proceeding. Iowa Code § 822.8; *Jones v. Scurr*, 316 N.W.2d 905, 911 (Iowa 1982). Willey also argues his trial counsel was ineffective for failing to move to void his first-degree burglary conviction for insufficient evidence. This court previously decided there was sufficient evidence to support Willey's conviction, thus this claim cannot be relitigated in this proceeding. *Id.*; *Willey I*.

IV. Jury Instructions

Willey asserts a number of errors related to two jury instructions. He contends the trial judge violated due process by instructing the jury that only one person had to be in the house when the first-degree burglary statute requires at least two people. Willey also argues counsel was ineffective for failing to object to this jury instruction. This court considered these arguments on direct appeal and found them to be without merit. *See Willey I*. Therefore, we will not reconsider the same arguments. *See* Iowa Code § 822.8; *Jones*, 316 N.W.2d at 911.

Next, Willey takes issue with the following jury instruction:

> [T]he State must prove all of the following elements of Burglary in the First Degree:
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> . . . .
>
> 6. a. During the burglary, the defendant possessed a dangerous weapon . . . or
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> b. During the burglary, the defendant intentionally inflicted bodily injury on Emelie Harmon . . . .
>
> If the State has proved all of the elements, the defendant is guilty of Burglary in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of

> Burglary in the First Degree, and you will then consider the lesser-included offense of Attempted Burglary in the First Degree . . . .

Willey asserts the phrase "during the burglary" as used in the instruction instructs the jury that a burglary occurred. Willey also argues his trial and appellate counsel were ineffective for failing to object to this instruction at trial. Jury instructions are to be read as a whole, "not piecemeal or in artificial isolation." *State v. Chambers*, 529 N.W.2d 617, 620 (Iowa Ct. App. 1994). The jury instruction at issue informs the jury that the State must prove all six elements of burglary in the first degree. The instruction also instructs the jury that if the State fails to prove any of the elements, the defendant is not guilty of first-degree burglary. Thus, the court does not instruct the jury that a burglary has occurred. Rather, the phrase "during the burglary" is used to explain that the enhancing element must occur contemporaneously with the other five elements. The jury's receipt of this instruction did not prejudice Willey. *See State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004) ("Error in giving a jury instruction does not merit reversal unless it results in prejudice to the defendant.").

V. Merger

Willey argues the district court failed to merge his convictions for assault with the intent to inflict serious injury and willful injury causing serious injury, although the court did merge the sentences. He further contends that his appellate counsel was ineffective for failing to raise this issue on appeal. While Willey properly summarizes Iowa Code section 701.9, he misreads the district court's judgment entry. The district court's calendar entry pronounces judgment only on the first-degree burglary and willful injury causing serious injury charges.

The district court referred to the charge of assault with intent to inflict injury as a lesser-included offense and properly merged the convictions.

In another merger argument, Willey contends his convictions for willful injury causing serious injury and first-degree burglary are based on the same act and therefore violate Iowa Code section 701.9 and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Thus, Willey argues that his conviction for willful injury causing serious injury should have merged with his conviction for first-degree burglary. Willey also alleges that his trial counsel was ineffective for failing to move to merge these two charges before trial and that his appellate counsel was ineffective for failing to raise these issues on appeal.

This court previously addressed and rejected Willey's section 701.9 argument. *See Willey II*. Thus, we do not reconsider that issue. *See* Iowa Code § 822.8; *Jones*, 316 N.W.2d at 911. Willey asserts that this court has not previously addressed his constitutional argument and therefore must address it now. "Iowa Code section 701.9 codifies the protection from cumulative punishment secured by the Double Jeopardy Clause of the United States Constitution." *State v. Daniels*, 588 N.W.2d 682, 683 (Iowa 1998). We find this court's prior analysis addressing the statutory claim and finding the injury elements to be different applies to the constitutional claim as well. *See State v. Ruesga*, 619 N.W.2d 377, 382-83 (Iowa 2000) (applying the legal elements test, as previously applied by this court in addressing Willey's 701.9 argument, in determining whether a conviction violated the Double Jeopardy Clause).

Therefore, Willey's convictions did not violate the Double Jeopardy Clause, nor were his counsel ineffective for failing to make a meritless argument.

VI. Other Ineffective-Assistance-of-Counsel Claims

Willey asserts a variety of claims alleging ineffective assistance of his trial counsel, without noting that he insisted before trial on representing himself, with counsel, in a hybrid pro se representation. In a thorough colloquy with the trial judge, Willey acknowledged that he understood that his self-representation constituted a waiver of any claims of ineffective assistance of trial counsel on postconviction relief. The State argues that Willey waived full representation of counsel at trial and so waived any claims of ineffective assistance of trial counsel, citing *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 2541 n.46, 45 L. Ed. 2d 562, 581 n.46 (1975) ("[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"). We need not reach the State's argument on waiver, since we find Willey's claims do not have merit.

A. Claim of Self-Defense

Willey asserts his trial counsel was ineffective for failing to assert a defense of justification, as Willey requested. This court previously addressed Willey's claim that the district court erred in declining to instruct the jury on self-defense. *See Willey I*. This court stated "Willey did not present any evidence to suggest that self defense was applicable . . . ." *Id.* Accordingly, we found the district court did not err in declining to instruct the jury on self-defense. *Id.* Trial

counsel was not ineffective for opting not to advance a justification defense for which there was no support in the record.

B. Cross-Examination

Willey asserts his trial counsel was ineffective in cross-examining Harmon and failing to challenge her credibility. Willey contends Harmon's testimony was contradictory, but his counsel failed to expose inconsistencies through effective cross-examination. The record overwhelmingly supports Willey's conviction. "[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). Harmon testified that Willey attacked her with a stun gun and also stabbed her multiple times. When Willey was arrested shortly after the incident occurred, he had in his possession a stun gun, a knife, Harmon's keys, and other incriminating items. Willey also had a substantial amount of blood on his clothes. Willey cannot show a reasonable probability that the result of his trial would have been different had his trial counsel more thoroughly cross-examined Harmon. Because Willey cannot show prejudice, this claim fails.

C. Defense Witnesses

Willey contends his trial counsel failed to present key witnesses in his defense. Specifically, Willey asserts his counsel should have presented evidence that he was framed, evidence that Harmon had no head injuries, and evidence that Harmon's loss of blood was not life-threatening. Willey failed to present evidence at the postconviction hearing in support of his assertions.

Further, in light of the overwhelming evidence discussed above, Willey cannot prove prejudice as required by *Strickland*. *Id.*

D. Hearsay

Willey asserts his trial counsel was ineffective for failing to object to hearsay evidence that an unknown person told a Department of Criminal Investigation agent that one of Harmon's house windows was open. Willey claims this led the jury to believe he was in Harmon's house, though no other evidence supported such a conclusion. On cross-examination, Willey's counsel elicited testimony from the agent that, in fact, the window at issue was closed. Thus, Willey cannot show *Strickland* prejudice. *Id.*

E. Motion for New Trial

Willey asserts that in light of the multitude of errors he alleges in this case, his trial counsel was ineffective for failing to file a motion for new trial. As discussed above, Willey's claims of error have no merit. Further, this court previously addressed the sufficiency of the evidence for the first-degree burglary conviction and the willful injury causing serious injury conviction. *See Willey I*. We found the evidence to be sufficient to support both convictions. *Id.* Accordingly, Willey cannot show he was prejudiced by his counsel's failure to file a motion for new trial. *See Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 (1984).

AFFIRMED.