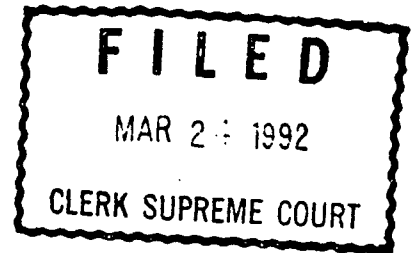


IN THE COURT OF APPEALS OF IOWA

No. 2-014 / 91-252



LEROY McFADDEN,

Appellant,

vs.

201

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County,
Ross Walters, Judge.

McFadden appeals the district court denial of
postconviction relief, claiming his appellate counsel
rendered ineffective assistance of counsel. **AFFIRMED.**

Francis C. Hoyt, Jr., West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson,
Assistant Attorney General, John P. Sarcone, County
Attorney, and Dan Voogt, Assistant County Attorney, for
appellee.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

SCHLEGEL, J.

Leroy McFadden was one of three persons who allegedly beat another man in 1987. The victim suffered severe injuries. McFadden did not deny he took part in the beating; however, he claimed he was too intoxicated to form any specific intent. McFadden was charged with the crime of willful injury. At his jury trial he presented a defense of diminished capacity due to intoxication. The jury rejected this defense and found McFadden guilty of willful injury. McFadden was convicted of that crime in February 1988.

McFadden directly appealed his criminal conviction. His appellate attorney raised a single issue, a contention that McFadden's trial should have been severed from the trial of a codefendant. In June 1989 we affirmed McFadden's conviction in an unpublished opinion. McFadden later filed this application for postconviction relief to challenge his conviction. The district court denied postconviction relief, and McFadden appeals.

McFadden contends his attorney in the direct appeal rendered ineffective assistance by failing to challenge the sufficiency of the evidence to support his conviction. McFadden asserts the appellate attorney should have argued the State's evidence failed to overcome his defense of diminished responsibility due to intoxication. The State argues McFadden failed to preserve this alleged error and failed to prove ineffective assistance of appellate counsel.

Because ineffective assistance of counsel is sufficient reason for failing to assert a claim earlier, Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984), we will first address the merits of McFadden's contentions. When a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980) (citation omitted). This is the equivalent of de novo review. Id.

In order to prove his appellate counsel gave ineffective assistance, McFadden must show counsel "failed to perform an essential duty" and "prejudice resulted therefrom." Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984) (citation omitted). McFadden has the burden of proof and must prove both of these elements by a preponderance of the evidence. Id. at 685 (citation omitted). We find McFadden has failed to meet this burden.

We determine counsel did not fail to perform a duty. The standard governing a challenge to the sufficiency of the evidence is that we will uphold a verdict where there is "substantial evidence" in the record tending to support the charge. "Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984) (citing State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981)). We

find any challenge to the sufficiency of the evidence on direct appeal would have failed.

There were several witnesses to the beating. They all testified similarly to the jury. Their testimony establishes McFadden became angry with the victim who was in a car in the process of ordering take-out food from the drive-up window of a fast-food restaurant. McFadden attacked the victim's car with a baseball bat, then opened the front door of the victim's car and attempted to assault the victim. McFadden's confederate then pulled the victim from the car. McFadden struck the victim hard in the legs, breaking his right leg, and when the victim bent over, McFadden then hit him in the head with the bat. We agree with the trial court determination the "jury could . . . have reasonably concluded that the aggravated, persistent, and deliberate nature of the assault evinced a specific intent to cause serious injury to the victim, and that the victim in fact suffered a serious injury."

Given the evidence in this case, the jury could reasonably conclude McFadden had formed a specific intent to injure the victim. See State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). The jury was fully instructed as to the intoxication defense. Given McFadden's movements and actions in attacking the victim, the jury found he formed the requisite specific intent and was guilty beyond a reasonable doubt of willful injury. See id. at 20-21 ("[t]he effect of defendant's heavy drinking on formation

of requisite specific intent to kill was for the jury to determine") (citations omitted).

Counsel breached no essential duty because it is within appellate counsel's professional judgment to avoid weaker claims. In addition, McFadden has not shown that but for counsel's alleged errors, there is a reasonable probability the outcome of his trial would have been different. Taylor, 352 N.W.2d at 685. We find McFadden has not overcome the presumption of competency of counsel and has not proven by a preponderance of the evidence he received ineffective assistance. We affirm the district court's denial of postconviction relief.

AFFIRMED.