IN THE COURT OF APPEALS OF IOWA

No. 5-707 / 94-1860

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LARRY JUNIOR SMITH,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
MAR 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Larry Junior Smith appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Kevin M. O'Hare of Johnson, Sudenga, Latham, Peglow & O'Hare, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and James DeTaeye, County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

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SACKETT, P.J.

Larry Smith appeals the district court's denial of his application for postconviction relief. Smith claimed he received ineffective assistance of counsel at his criminal trial because his counsel failed to move for a mistrial following the introduction of prejudicial evidence. We affirm the decision of the district court.

Smith was convicted of the crimes of attempted murder in violation of Iowa Code section 707.11 (1991), willful injury in violation of section 708.4, and going armed with intent in violation of section 708.8. These convictions were affirmed on appeal. *State v. Smith,* 515 N.W.2d 572 (Iowa App. 1993) (unpublished).

The evidence introduced at the criminal trial showed on the morning of January 14, 1992, Smith went to the home of the victim, Sandra Deahl. Deahl was Smith's neighbor and a first cousin of his former wife, Janice Smith. Smith asked Deahl why she had gone to a cafe with Janice and two men. Deahl told Smith she would talk to him later. Smith then raised a shotgun and shot Deahl in the abdomen. As Smith was attempting to reload, Deahl pushed him from the door and pulled it shut. She called the police. Immediately after the shooting, Smith told his brother and Dixie Osborne he shot Deahl.

The district court ruled in response to Smith's motion in limine that threats Smith made on January 10, 1992, against persons other than Deahl would not be admissible, but Smith's statements made after that date that included Deahl and Janice would be admissible and relevant.

At the trial, Osborne testified shortly before the shooting Smith called her from a bar and said he wanted a gun because he was going to shoot somebody. Osborne also testified about an hour later Smith told her he could not make up his mind whether to shoot Janice first and then Deahl, or to shoot Deahl first and then Janice. Osborne further testified Smith told her he might shoot somebody by the name of Norm.

In his postconviction application, Smith claimed he received ineffective assistance because his trial counsel did not move for a mistrial or ask for an admonition to disregard Osborne's statements Smith had threatened persons other than Deahl. The district court found Smith had failed to show he received ineffective assistance of counsel.

Smith appeals contending the admission of Osborne's testimony he threatened to shoot others was not a strategic maneuver by his defense counsel, but rather an egregious failure to preserve error. Smith claims the evidence was inadmissible under the court's ruling on his motion in limine. He asserts the evidence was not relevant to the case and was prejudicial to him. Smith contends, had the evidence not been admitted, the jury might have determined there was not sufficient evidence he had specific criminal intent to harm Deahl.

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214

(Iowa 1992). Representation by counsel is presumed competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

To succeed, Smith must show his trial attorney's failures worked to his disadvantage to the end that there is a reasonable probability, but for his attorney's errors, the result of the proceeding would have been different. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

Smith has failed to show he was prejudiced by his trial attorney's failure to seek a mistrial after the admission of the challenged evidence or by his trial attorney's failure to request the trial court to admonish the jury to disregard the evidence. There was overwhelming evidence Smith intended to shoot Deahl. Diane Needs testified she had heard Smith say he wanted to beat Deahl and kill her. Osborne testified in the two days before the shooting, and on the day of the shooting, Smith said several times he was going to kill Deahl. Furthermore, the evidence showed after shooting Deahl, Smith attempted to reload the shotgun, presumably to shoot her again.

Smith failed to show prejudice. We need not address the other issues he raised on appeal. We affirm the decision of the district court denying his application for postconviction relief. Costs of this appeal are assessed to Smith.

AFFIRMED.