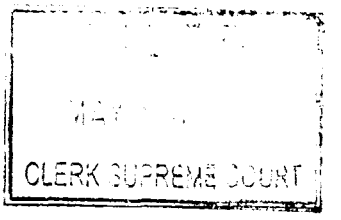
IN THE COURT OF APPEALS OF IOWA

No. 9-184 / 98-0834
Filed May 26, 1999



HARRIS KOLE EVANS, JR.,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

Harris Evans appeals from the district court ruling denying his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William R. Byers, County Attorney, and Deb Shelby, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Harris Evans appeals the district court ruling denying his application for postconviction relief. Evans contends he received ineffective assistance of counsel because his trial counsel failed: (1) to ask for a jury instruction on compulsion, (2) to allow Evans to testify, and (3) to call Dr. John Garfield as a witness. We affirm.

Evans, Troy Mure, Joey Wheels, and Doug Jones were involved in a robbery attempt at a farmhouse in Adel in July 1991. During the robbery, two women were killed and a man was wounded. Eventually, Evans and the others were each charged with two counts of first-degree murder and one count of attempted murder. Evans was tried separately.

The State presented its case against Evans by way of seventeen witnesses. One of the witnesses was Evans' uncle, Patrick Dock. He testified Evans had called him at two o'clock in the morning crying, upset, and saying he "had did something bad." The next day Evans visited Dock at home and tried to tell him about the events in Adel. Dock testified Evans was crying and said there were two women, a man, and a baby at the farmhouse. Dock said Evans was disturbed and he had never seen him cry before. He said Evans never told him he had been forced to go into the farmhouse. Dock testified on cross-examination he did not want to hear Evans' story, was not paying attention to it, and would not allow Evans to finish telling him what had happened.

The State's main witness was Wheels, who testified in exchange for the State allowing him to plead guilty to reduced charges of second-degree murder and attempted murder. Wheels testified Evans told him there were some people on a farm who had some crack cocaine in their refrigerator. Wheels, Mure, Jones, and Evans proceeded to the farmhouse and Jones produced three handguns. The occupants of the house were ultimately brought into the house at gunpoint, at which time the men began searching for drugs. Wheels said he was upstairs searching for drugs when Jones called for him to come downstairs. Wheels testified he saw Evans shoot Jeffery Thomas, and saw the body of another victim lying near Thomas. Later, Mure threw the gun into the Des Moines River.

The State rested and Evans' trial counsel made the following record:

> Q. (by John Wellman) Mr. Evans, you and I have talked before this date and just during this recess concerning whether or not you want to testify in this trial, is that right? A. Yes.
>
> Q. And I have explained to you that there is nobody in the world, not this judge or anybody that can force you to testify if you don't want to, do you understand that? A. Yes.
>
> Q. And likewise, I've explained to you that there's nobody in the world that can prevent you from testifying if you want to testify, there's nobody that can stop you from doing that. And that's your absolute right to make the decision, do you understand that? A. Yes.
>
> Q. And you and I have discussed the case obviously for a number of months and there just recently over the recess, and I have attempted to advise you as best I can of legal ramifications as to whether or not you'd testify. Do you feel you've had enough time to discuss it, whether or not you want to testify? A. Yes.
>
> Q. And have you made a decision? A. Yes.
>
> Q. And what is that decision? A. No.
>
> Q. You don't want to testify in this trial? A. No, I do not.

> Q. Now, I'm your lawyer, but have I put any pressure on you or threatened you or said Harris, I'm your lawyer and I say you can't testify and/or anything like that, or is this your free, voluntary decision? A. This is my voluntary decision, I don't want to.

Evans did not testify and no witnesses were presented on his behalf. The jury convicted Evans on all counts against him. Evans appealed and we affirmed the trial court on all issues. Evans filed an application for postconviction relief on the grounds he received ineffective assistance of trial and appellate counsel.

Evans' version of events is that he was driving the other men to Adel to buy cocaine, he attempted to leave the farmhouse, and was present during the robbery and murders only because of the gun held on him by Mure. Evans' trial counsel testified he prepared a compulsion defense for trial but did not request a jury instruction on compulsion because he believed it was unavailable as a defense because there had been physical injury.

Dr. John Garfield, a psychologist, visited with Evans at his trial counsel's request. Dr. Garfield observed symptoms of post-traumatic stress disorder and concluded these symptoms were consistent with Evans being a passive observer of events in the farmhouse rather than an active participant in them. Dr. Garfield believed Evans was competent to testify but would have needed a great deal of support. Dr. Garfield also performed an IQ test and concluded Evans was in the borderline range of intellectual functioning. Evans' trial counsel listed Dr. Garfield as a potential witness but did not call him to testify at trial.

The district court found Evans established "sufficient reason" for not having raised the issue of ineffective assistance of trial counsel on direct appeal. The district court then denied Evans' application in its entirety.

I. STANDARD OF REVIEW. Ordinarily a postconviction relief proceeding pursuant to Iowa Code chapter 663A is at law and our review is not de novo. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987); *Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985) (citing *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980)). However, when a postconviction petitioner asserts a violation of constitutional safeguards, the reviewing court makes its own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Cuevas*, 415 N.W.2d at 632; *Hinkle*, 290 N.W.2d at 30. A postconviction claim of ineffective assistance of counsel asserts a violation of constitutional safeguards. *See Schertz*, 380 N.W.2d at 408. Thus, our review is de novo. *Cuevas*, 415 N.W.2d at 632.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if

the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Evans' conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

A. Failure to Ask for a Jury Instruction on Compulsion. Evans contends trial counsel's failure to ask for a jury instruction on compulsion constitutes ineffective assistance of counsel. We disagree.

Trial counsel testified at the postconviction hearing he did not believe there was any legal ground to ask for an instruction on compulsion because two people had died and one person was seriously injured. The district court concluded, and we agree, under present Iowa law the defense was unavailable. The murder charge against Evans were submitted to the jury on a felony-murder theory with robbery the underlying felony. Therefore, a compulsion defense was unavailable because record shows the underlying felony involved a physical injury. *State v. Proc*

N.W.2d 841, 843 (Iowa 1998). Even under the theory of aiding and abetting, the defense would be unavailable. As an aider and abettor, Evans' use of the defense is subject to the same limitations as a principal's. *State v. LeCompte*, 327 N.W.2d 221, 224 (Iowa 1982).

We conclude Evans has failed to establish his right to a compulsion instruction under the record before us, and therefore counsel did not breach an essential duty in failing to seek an instruction on compulsion.

B. Failure to Allow Evans to Testify. Evans contends trial counsel's failure to allow him to testify constitutes ineffective assistance of counsel. We disagree.

We will assume only the defendant can choose whether to testify in a criminal case and that choice cannot be ignored by trial counsel. *Nims v. State*, 401 N.W.2d 231, 235 (Iowa App. 1986). Our review of the record shows Evans voluntarily decided not to testify. Evans cannot now assert a claim of ineffectiveness of counsel based on his own decision not to testify. *See Schertz*, 380 N.W.2d at 413.

C. Failure to Call Dr. Garfield as a Witness. Evans contends trial counsel was ineffective for failing to call Dr. John Garfield to testify at trial. We disagree.

Evans argues Dr. Garfield would have testified he suffered from symptoms of post-traumatic stress disorder when evaluated before trial. Evans contends this evidence would be consistent with him being a passive observer of events and not an active participant in the murders. Trial counsel testified at the postconviction hearing he did not recall why he did not call Dr. Garfield. He further testified any evidence

this witness had was already testified to by Evans' uncle. In addition, trial counsel testified he felt the testimony would have been subject to challenge on the ground that Evans was suffering from post-traumatic stress disorder *for the specific reason* he had participated in the murders. In any event, he decided not to call Dr. Garfield.

We have reviewed the evidence in this case and conclude it is unquestionably sufficient to support a guilty verdict. Evans was charged under a theory of felony murder. There can be no dispute he was an active participant in the robbery attempt. His uncle testified that approximately one month before this incident, Evans had stated he would be "coming into a large sum of money" and that he was "going to Adel to get it." We conclude Evans has failed to prove his trial counsel breached an essential duty. Even assuming such had been established, there is no showing of prejudice. There is no "reasonable probability" Evans' trial would have had a different result if Dr. Garfield had been called to testify.

We have carefully reviewed the issues presented and conclude the decision of the district court should be affirmed.

AFFIRMED.

Vogel, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I dissent. I believe (1) Evans' trial attorney was ineffective in advising he not testify, and (2) Evans suffered prejudice. I would grant him a new trial.

Evans' trial attorney admittedly advised Evans not to testify. I recognize, as the majority has carefully pointed out, a record was made showing Evans' accepted that advise and made an allegedly voluntary decision not to testify. In most cases, I would agree with the majority this would be sufficient to deny postconviction relief. However, I look to Evans' argument his trial attorney, in advising him not to testify, had not correctly assessed the available factors before making the decision. Evans' trial attorney relied only on the fact Evans would not make a good witness.

The testimony against Evans targeting him as the mastermind came from a witness who was a party to the events. While there was evidence from a DCI agent Evans did not, as the other witness said, shoot the victims, this testimony was based only on the agent's interview of Evans, and the testimony was not the same kind of positive denial Evans could have made. There was no real opportunity for the jury to weigh his credibility. While we know Evans did not have to testify, it is difficult to believe on this record the jury did not assess that failure to his detriment in this particular case. This, coupled with the evidence Dr. Garfield was prepared to testify Evans suffered from what Evans had seen, not from what he had done, causes me to believe Evans was prejudiced.

At the end of the trial, Evans' defense rested without introducing evidence in a case so stacked against Evans he had nothing to lose and a probability of gaining by testifying.

MAY 26, 1999

Pursuant to Iowa Supreme Court Rule 10(f), as amended March 3, 1981, an unpublished opinion of the Iowa Court of Appeals may not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

NOTE: Copies of these opinions may be obtained from the Clerk of the Supreme Court, State Capitol, Des Moines, IA, 50319, for a fee of forty cents per page.

No. 98-0834. [9-184] EVANS v. STATE

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Vogel and Mahan, JJ. Opinion by Mahan, J. Sackett, C.J., dissents. (10 pages $4.00)

Harris Evans appeals the district court ruling denying his application for postconviction relief. Evans was convicted of two counts of first-degree murder and one count of attempted murder stemming from a robbery attempt at a farmhouse in Adel. Evans did not testify and no witnesses were presented on his behalf. He contends he received ineffective assistance of counsel because his trial counsel failed to ask for a jury instruction on compulsion, allow Evans to testify, and call Dr. Garfield as a witness. **OPINION HOLDS: I.** ***Failure to Ask for a Jury Instruction on Compulsion.*** Counsel did not breach an essential duty; current Iowa law precludes the use of a compulsion defense in cases such as this where the underlying felony involves a physical injury. Even as an aider and abettor, Evans' use of the defense would be subject to the same limitations as a principal's. **II.** ***Failure to Allow Evans to Testify.*** Our review of the record shows Evans voluntarily decided not to testify. He cannot now assert a claim of ineffective assistance of counsel based on his own decision not to testify. **III.** ***Failure to Call Garfield as a Witness.*** Evans argues Garfield would have testified he suffered from symptoms of post-traumatic stress disorder and that this evidence would be consistent with him being a passive observer of the events and not an active participant in the murders. Trial counsel testified he felt the testimony would have been subject to challenge on the ground that Evans was suffering from post-traumatic stress disorder *for the specific reason* he had participated in the murders. After review of the evidence, we conclude it is unquestionably sufficient to support a guilty verdict. We conclude Evans failed to prove trial counsel breached an essential duty. Even if he had, there is no showing of prejudice. **DISSENT ASSERTS:** I dissent. I believe (1) Evans' trial attorney was ineffective in advising he not testify, and (2) Evans suffered prejudice.

I would grant him a new trial. Evans' trial attorney admittedly adv[redacted] Evans not to testify. I recognize, as the majority has carefully pointed out, a record was made showing Evans' accepted that advise and made an allegedly voluntary decision not to testify. In most cases, I would agree with the majority this would be sufficient to deny postconviction relief. However, I look to Evans' argument his trial attorney, in advising him not to testify, had not correctly assessed the available factors before making the decision. Evans' trial attorney relied only on the fact Evans would not make a good witness. The testimony against Evans targeting him as the mastermind came from a witness who was a party to the events. While there was evidence from a DCI agent Evans did not, as the other witness said, shoot the victims, this testimony was based only on the agent's interview of Evans, and the testimony was not the same kind of positive denial Evans could have made. There was no real opportunity for the jury to weigh his credibility. While we know Evans did not have to testify, it is difficult to believe on this record the jury did not assess that failure to his detriment in this particular case. This, coupled with the evidence Dr. Garfield was prepared to testify Evans suffered from what Evans had seen, not from what he had done, causes me to believe Evans was prejudiced. At the end of the trial, Evans' defense rested without introducing evidence in a case so stacked against Evans he had nothing to lose and a probability of gaining by testifying.