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IN THE COURT OF APPEALS OF IOWA

MICHAEL LEE GRIFFIN,	)	
Applicant-Appellant,	)	
vs.	)	
STATE OF IOWA,	)	8-678 87-1564
Resister-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County (No. 66475), Joseph C. Keefe, Judge.

Applicant appeals from the denial of postconviction relief after a jury found him guilty of second-degree burglary. **AFFIRMED.**

William L. Wegman, State Public Defender, and Barbara M. Anderson, Assistant Public Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Scott Lemke, Assistant Black Hawk County Attorney, for resister-appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

A jury found Michael Griffin guilty of second-degree burglary after hearing testimony that he forcibly entered the apartment of a former girlfriend and threatened to rape her. The trial court initially sentenced him to ten years imprisonment, but then suspended that sentence and placed him on probation for two to five years. The probation was later revoked when Griffin was convicted on two counts of assault.

Griffin subsequently applied for postconviction relief from the burglary conviction, alleging ineffective assistance of counsel, but the trial court denied his application. He now appeals that denial.

On appeal, the applicant claims his counsel: 1) filed a voluntary dismissal of the applicant's initial appeal of his conviction without his approval; 2) failed to elicit testimony about the prosecutor's pressure on the victim to continue pressing charges; 3) failed to object to testimony about a prior slapping incident; and 4) elicited or allowed to be elicited testimony about the victim being followed by the defendant.

The law governing a claim of ineffective assistance of counsel is well settled. The applicant bears the burden to prove the claim and must rebut the presumption that counsel is competent. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). The applicant must show that by a specific act or

omission counsel failed to perform an essential duty and that prejudice resulted from the failure. State v. Miles, 344 N.W.2d 231, 233 (Iowa 1984). Prejudice requires showing a reasonable probability exists that the result would have been different but for counsel's act or omission. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 693 (1984).

Counsel's performance is presumed to be competent and is judged according to the entire record and totality of circumstances of the case. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). An affirmative factual basis demonstrating counsel's inadequacy is required. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Actions or omissions which are characterized as trial tactics and strategies ordinarily do not show ineffectiveness of counsel, even though unsuccessful. Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980).

Our review of the claim is based on the totality of the circumstances. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). This is the equivalent of a de novo review. Sims, 295 N.W.2d at 422.

The applicant first argues that because his appellate counsel was the same person who represented him at trial, he is not prevented from raising claims of ineffective assistance here for the first time. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). The State does not dispute

this. Therefore, we will consider the merits of his remaining three claims.

I. The applicant claims that his attorney failed to elicit testimony about the prosecutor's pressure on the victim to continue pressing the burglary charge after she agreed to seek dismissal of the charge. According to the applicant, the victim testified that she felt sorry for the applicant and that he had said he "wouldn't do it again." He claims the evidence of the prosecutor's pressure would rebut the inference from her testimony that the applicant admitted the act.

The applicant has failed to present an affirmative factual basis supporting this claim. There is no evidence that the attorney was aware of any evidence of the prosecutor's pressure. Also, the applicant did not testify to telling his attorney about incidents involving the prosecutor. No breach of duty has been shown on this claim.

II. The applicant claims his attorney failed to make an objection to testimony by the victim that the applicant had slapped her on a prior occasion. The applicant denied the slapping on cross-examination. The failure to object, according to the applicant, waived the error and allowed the jury to hear irrelevant, prejudicial testimony about a prior, unrelated act, citing Iowa Rules of Evidence 402, 403, 404.

All relevant evidence is admissible except as otherwise provided by laws of the country and the state. Iowa R. Evid. 402. "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, ..." Iowa R. Evid. 403. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes . . . ." Iowa R. Evid. 404(b).

The slapping incident occurred two weeks prior to the burglary. The applicant and the victim had been dating for several months prior to this incident. They had a fight and the applicant slapped her while in her apartment. She told him to leave and never come back again.

The State submits, and we agree, that this testimony was relevant to show that the applicant did not have authority to enter the home. See Iowa Code § 713.1. This legitimate reason was unrelated to trying to show a criminal propensity. Cf. State v. Kellogg, 263 N.W.2d 539, 542 (Iowa 1978) (In murder prosecution, State may introduce evidence of prior relationship between the parties including incidents of physical assaults if that evidence bears on defendant's motive or intent.)

Finding the testimony admissible, we cannot find that applicant's counsel breached an essential duty.

III. Finally, applicant argues that his attorney elicited prejudicial evidence from the victim that petitioner followed her to various places both before and after the crime. This created "opportunities" for the State to develop this evidence further. Applicant claims this testimony was irrelevant and prejudicial because it tended to create a false image of the applicant stalking the victim.

Applicant's counsel merely asked the victim if she had seen the applicant earlier in the day on the date of the incident and whether she had seen him since that night. The victim testified that she had seen him in her own church that morning and in another church that night. At the first church, he arrived after she did, sat close to her but did not attempt to talk with her. At the second church, she did not see him until after the service had begun and again they did not speak.

After the second service, the victim went to her mother's home where the applicant also showed up. The applicant knew the victim's mother and the victim said she was not surprised to see him there. Again they did not speak. The applicant stayed at the mother's house when the victim left to go home. The burglary incident occurred later that night. Since the incident, the victim visited the applicant in jail, she said at her mother's request.

At trial, the applicant denied following the victim to the church. He testified that he went to the first church because he likes gospel singing. He went to the second church because the victim's mother had invited him to the special singing concert there. He said he went to the mother's home because he had visited there often and felt welcome any time.

From the testimony elicited, we fail to find a breach of an essential duty by the applicant's counsel. Instead, we see the result of a tactical or strategic decision of the attorney by which the applicant is bound. See State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). While it is possible that the results of this decision were not as planned, an attorney's competence must be judged by his overall performance, not by a single mistake. Karasek v. State, 310 N.W.2d 190, 192 (Iowa 1981). We find that counsel's performance, on the whole, afforded applicant diligent and effective representation.

Furthermore, on the issue of prejudice, it has not been shown how any of this testimony with reasonable probability would have changed the outcome of the trial. The evidence presented included ample signs of a forcible entry into the victim's apartment. At trial, it was established that the door was in good shape prior to this incident and that both locks worked. The police who were called to the scene found the drainlock broken, wood splinters from the door,

the door jam was split, and the bolt used for the door knob lock was bent. The evidence of the prosecutor's pressure, the slapping incident, and the victim seeing the applicant at other times would not have with reasonable probability changed the result.

Therefore, the denial of postconviction relief is affirmed.

AFFIRMED.