

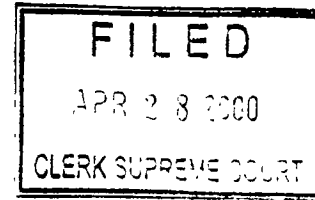
IN THE COURT OF APPEALS OF IOWA

No. 0-009 / 98-2141
Filed April 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL VERNON BAKER,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Lynne E. Brady,
Judge.

Michael Baker appeals his conviction, following a jury trial, for assault with
intent to inflict serious injury in violation of Iowa Code sections 708.1 and
708.2(1)(1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Russell G. Keast, Assistant
County Attorney for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

~~Michael~~ Baker challenges the sufficiency of the evidence to support his conviction for assault with intent to inflict serious injury, in violation of Iowa Code sections 708.1 and 708.2(1) (1997). He also contends his trial attorney was ineffective. We affirm.

I. Background Facts and Proceedings

David Severs was Baker's acquaintance. On July 8, 1998, Severs drank close to two bottles of vodka, then took a taxi to Baker's house to "hang out." Severs smoked some marijuana, drank some more vodka, and, according to Severs, passed out on Baker's couch. He recalled awakening to find himself falling down steps to Baker's basement. Blood was running down from a cut over his eyes and there was a gash on his head. Baker carried Severs upstairs, put him into a shower and told him to clean up. When Severs finished, Baker handed him paper and told him to write a letter stating Baker had nothing to do with Severs's injuries. Wearing only his underwear, Severs began to do so. To gain compliance, Baker struck Severs on top of his head, across his collarbone and on his back, using a yellow stick not unlike a broom handle. Baker then drove Severs home and left him in the parking lot. Neighbors called an ambulance. Severs was transported to a hospital where he remained for several days. He sustained injuries to his face, including a fractured nose and cheekbone, five fractured ribs and fractured hand bones, a head laceration, and extensive bruising to his face and back.

The State charged Baker with willful injury. Baker signified his intent to claim self-defense. The jury returned a verdict finding him guilty of the lesser

included offense of assault with intent to inflict serious injury. The district court adjudged him guilty, sentenced him to an indeterminate prison term not to exceed two years, and ordered him to pay a fine of \$500. This appeal followed.

II. Sufficiency of Evidence

Baker contends the evidence was insufficient to support his conviction. Our review is limited to assigned error. *State v. Westeen*, 591 N.W.2d 203, 206 (Iowa 1999). We will uphold a district court's ruling on a motion for judgment of acquittal "if there is substantial evidence in the record to support the defendant's conviction." *Id.* (quoting *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998)). While we consider all the evidence, not just the evidence supporting the verdict, it is up to the jury to judge the credibility of witnesses and weigh the evidence. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999).

The record contains substantial evidence to support the conviction. Baker a six foot two inch tall, 240 pound former fullback, admitted he struck Severs with "left-right" punches to his face, causing Severs to fall down. He also admitted he later used a broom to strike Severs several times on the back. Baker maintains Severs precipitated the confrontation by acting out of control, spilling alcohol on his remote controls, stomping on his toe, and later backing him into his speakers. However, he conceded Severs was a "skinny little guy" who did not scare him, and was a person he normally would not fight.

While Baker's expert testified that certain injuries were consistent with a fall and others were consistent with a fist fight, the hospital's attending physician stated Severs's injuries were consistent with a beating. He also stated certain welts on Severs's chest were "difficult to explain by one or even two blows from a

fall." The jury was free to accord greater weight to the testimony of the attending physician. *Id.* at 60. In light of this evidence, we conclude the district court did not err in overruling Baker's motion for judgment of acquittal.

III. Ineffective Assistance of Counsel

Baker contends he received ineffective assistance of counsel at trial because his attorney (1) did not preserve his justification defense and (2) failed to object to jury instructions which did not apply the justification doctrine to lesser-included offenses. We review a claim of ineffective assistance of counsel de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). While we normally preserve ineffective assistance of counsel claims for postconviction proceedings, we may resolve these claims on direct appeal if the record is sufficient. *State v. Shortridge*, 589 N.W.2d 76, 84 (Iowa App. 1998).

To succeed on his claim, Baker must prove (1) his trial counsel breached an essential duty and (2) he was prejudiced by the error. *State v. Arne*, 579 N.W.2d 326, 330 (Iowa 1998). We presume Baker's attorney was competent. *Id.* Failure to preserve error will rarely be sufficient to support a conclusion that counsel was ineffective. *State v. Halstead*, 362 N.W.2d 504, 508-09 (Iowa 1985); *Foster v. State*, 378 N.W.2d 713, 717 (Iowa App. 1985). Even if Baker proves his attorney breached an essential duty, he cannot prevail on his ineffective assistance claim unless there is a "reasonable probability that, but for the errors, the results of the proceedings would have been different." *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998).

A. Motion for Judgment of Acquittal

Baker contends his attorney was ineffective in failing to argue in his motion for judgment of acquittal that Baker's actions were justified. The State counters that Baker's attorney did not breach an essential duty because there was not substantial evidence of self-defense and the State proved Baker acted without justification. We choose to resolve this issue on the basis of the "prejudice" prong. The record evidence reveals more than a reasonable probability the motion for judgment of acquittal would have been denied even if Baker's attorney had raised the justification defense. Therefore, we conclude Baker failed to prove his attorney's omission resulted in prejudice and we deny this ground for his ineffective assistance claim.

B. Jury Instructions

Baker contends his trial attorney should have insisted on an instruction that the justification defense applied to all lesser included offenses, just as it did to the charged offense of willful injury. He maintains the instructions as given implied that justification applied only to the willful injury charge.

Instruction No. 18 states:

The State must prove all of the following elements of Willful Injury:

1. On or about the 8th day of July, 1997, the Defendant did hit and/or kick David Severs.
2. The Defendant specifically intended to cause a serious injury to David Severs.
3. David Severs sustained a serious injury.
4. Defendant acted without justification.

If you find the State has proved all of the elements, the Defendant is guilty of Willful Injury. If the State has failed to prove any one of the elements, the Defendant is not guilty of Willful Injury and you will then consider the charge of Assault with Intent to Inflict Serious Injury explained in Instruction No. 26.

Instruction No. 26 states:

The State must prove all of the following elements of Assault With Intent to Inflict Serious Injury:

1. On or about the 8th day of July, 1997, the Defendant did assault David Severs.
2. The Defendant had the apparent ability to do the act.
3. The act was done with the specific intent to cause a serious injury.

[I]f the State has proved all of the elements, the Defendant is guilty of Assault With Intent to Inflict Serious Injury. If the State has failed to prove any one of the elements, the Defendant is not guilty of Assault with Intent to Inflict Serious Injury, and you will then consider the charge of Assault Causing Bodily Injury.

The court also gave the jury two general instructions on justification, which followed the marshalling instruction on willful injury. We agree with Baker that the content of Instruction Nos. 18 and 26, together with the positioning of the justification instructions could have led a jury to conclude the justification defense only applied to the crime of willful injury and not to the lesser included offenses. However, in light of the evidence summarized in Part II of this opinion, we conclude there was a reasonable probability the outcome would not have changed even if Baker's attorney had objected to the instructions as formulated and insisted on a statement that justification applied to all lesser included offenses. Accordingly, we conclude Baker failed to prove he was prejudiced by his attorney's omissions and we reject this ground for his ineffective assistance claim.

We affirm Baker's judgment and sentence.

AFFIRMED.

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