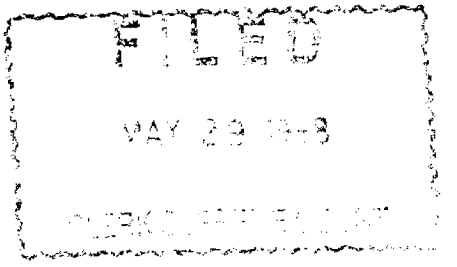
IN THE COURT OF APPEALS OF IOWA

No. 8-185 / 96-264



STATE OF IOWA,
Appellee,

vs.

SHANNON BLACKMORE,
Appellant.

SHANNON BLACKMORE,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Ida County, Gary E. Wenell, Judge.

Defendant, Shannon Blackmore, appeals judgment and sentence entered for willful injury, and the denial of his application for postconviction relief. **AFFIRMED.**

E.A. Jacobson of the Jacobson Law Firm, P.C., Ida Grove, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Steve Young, Assistant Attorneys General, and Kirk E. Goettsch, County Attorney, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ. Sackett, J., takes no part.

VOGEL, J.

Shannon Blackmore appeals judgment and sentence entered for willful injury, and the denial of his application for postconviction relief. He contends his trial counsel was ineffective in numerous respects. Because we find Blackmore did not demonstrate that he was prejudiced by the actions of trial counsel, we affirm the district court and uphold Blackmore's conviction.

Background facts. Blackmore, was with a group of friends on the evening and early morning hours of December 30 and 31, 1994. Blackmore had been drinking and verbally confronted another man, Doug Dublinske, outside a pizza parlor in Ida Grove. Blackmore assaulted Dublinske, and kicked him in the face. Dublinske was taken to the hospital, where he received fifteen stitches under his left eye.

On April 21, 1995, the State filed a trial information against Blackmore for willful injury, in violation of Iowa Code section 708.4 (1993).[1] Blackmore retained attorney Steven Engelhardt.

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[1] Iowa Code section 708.4 defines the elements of willful injury as:

> [a]ny person who does an act which is not justified and which is intended to cause and does cause serious injury to another commits a class "C" felony.

Plea negotiations were unsuccessful. At trial, the defense presented theories that Blackmore was intoxicated, someone else was responsible for the injury, and the injury was not serious.

The jury found Blackmore guilty as charged. Because willful injury is a forcible felony, Blackmore was sentenced to an indeterminate ten-year prison term.

Blackmore filed a PCR application, alleging Engelhardt was ineffective in numerous respects. Following a hearing, the district court denied the application. Blackmore appeals.

Scope of review. We review appeals from postconviction proceedings ordinarily for errors of law. *See Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). However, when constitutional rights are implicated, we make our own evaluation of the totality of the circumstances in a de novo review. *Id.*

Ineffective assistance of counsel. Blackmore argues his trial counsel was ineffective by failing to (1) exhaust plea bargaining remedies, (2) appear at his own motion hearing, (3) fully investigate the case, (4) move for discovery, (5) timely designate an expert, (6) move for a continuance after learning his expert witness was excluded, (7) abandon the intoxication defense due to the lack of expert testimony, and (8) attend closing arguments.

In order for Blackmore to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the evidence that 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Blackmore must establish under the first prong of this test that counsel's performance was not within the

normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Blackmore must prove but for counsel's error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; *see Strickland v. Washington*, 466 U.S. 668, 694 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

We need not determine whether counsel's performance was deficient before examining whether the defendant suffered prejudice as a result of the alleged deficiencies; "[i]f it is easier to dispose of an ineffectiveness claim on the lack of sufficient prejudice . . . that course should be followed. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa App. 1989). Thus, stated differently, it is not necessary that a court deciding an ineffective assistance claim address both components of the inquiry if an applicant makes an insufficient showing on one. *Whitsel*, 439 N.W.2d at 872.

The county attorney, aided by an assistant attorney general, offered to reduce the charge to an aggravated misdemeanor with a two-year sentence; Blackmore rejected this and Englehart countered by offering his client serve thirty days, with the charge being a simple misdemeanor. The county attorney rejected this. Engelhardt did not offer another counter plea as it was made clear to Engelhardt it would be fruitless to pursue further plea negotiations. This is due in part to conversations he had with the county attorney and in part to the assistant attorney general's letter to Engelhardt dated October 24, 1995 (Exhibit 4):

"if your client does not accept the terms of the agreement . . . [the offer of the aggravated misdemeanor charge], then there will be no further plea concessions and the case will go to trial as charged."

For Blackmore to demonstrate that he suffered prejudice for failure of his counsel to exhaust plea negotiation, Blackmore would have to prove that something that was *not* discussed in the course of plea negotiations would have been plausibly entertained by the county attorney. The record is void of such evidence. Therefore, we agree with the trial court that no prejudice was demonstrated.

Regarding Engelhardt's absence from the June 30, 1995, motions hearing, we similarly find no prejudice resulted. Engelhardt testified he told someone at the county attorney's office that he had a conflict with the scheduled proceeding and "it was confirmed that we would continue those [discovery requests] for another day." Engelhardt also spoke directly to the county attorney, Mr. Goettsch, on the morning of June 30 to remind him Engelhardt would not be at the hearings. Engelhardt testified, "I was very surprised when, in spite, of the fact that I believed we had an agreement not to hear those motions at that time that Mr. Goettsch proceeded and took it to the judge." Engelhardt testified he nevertheless did not cause prejudice to Blackmore by missing the hearing as the trial information contained detailed statements and "we had all the statements of all the witnesses, and all the statements of all the lay witnesses were attached to it. . . . We were able to get contradictory evidence and impeachment in every one of those." We do not find that but for counsel's

failure to attend the hearing the outcome of the case would have been different. *See Ray*, 516 N.W.2d at 865.

Some of Blackmore's complaints involve the strategy of trial counsel. However, improvident strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 (concerning counsel's method of investigating a particular case, the Court stated: "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation.").

Engelhardt had his new associate, Jason Shaw, assist him in preparation for and during trial. Shaw delivered the closing argument and Engelhardt was not present. This was discussed with Blackmore and agreed upon prior to the closing argument. As Engelhardt testified to at the post conviction hearing, he made a tactical decision to divide up the workload and also apprised the jury in his opening statement that Shaw would be conducting closing arguments. Moreover, Blackmore had no objection to Shaw giving the closing. Blackmore was told Engelhardt had been working extensively with Shaw in preparing the closing statement and had gone over Shaw's outline with him. Blackmore offers no

evidence that Shaw's performance in the closing argument was in any way deficient and therefore prejudicial.

Blackmore next asserts his counsel was ineffective in failing to timely designate an expert, Dr. Bendixen, to correlate Blackmore's level of intoxication to his inability to form the specific intent to commit willful injury.

Counsel's actions are usually based in part on information supplied by the defendant and, consistent with this view, the Iowa Supreme Court has recognized that the duty to investigate and prepare a defense is not limitless. *Whitsel*, 439 N.W.2d at 873. We are also mindful that the courts should "strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700.

Blackmore raised the defense of diminished capacity. The burden to prove specific intent remains on the State; conversely, the defendant does not have the burden to prove specific intent was negated by defendant's intoxication. *See State v. Templeton*, 258 N.W.2d 380, 382-83 (Iowa 1977); *Walker*, 538 N.W.2d at 320. Accordingly, Engelhardt as defense counsel in this case was not required to retain an expert to refute the State's anticipated evidence regarding specific intent.

Moreover, this court previously held in *State v. Walker* a "defendant's alleged intoxication is simply evidence which the fact finder should consider on the issues of the defendant's specific intent. The effect of defendant's drinking on the formation of the

requisite specific intent was for the jury to determine." *Id.*, 538 N.W.2d 316, 320 (Iowa App. 1995) (citation omitted); *accord State v. Wilkins*, 346 N.W.2d 16, 20-21 (Iowa 1984); *State v. Pletka*, 310 N.W.2d 525, 529-30 (Iowa 1981) Thus, it is within the purview of the jury's duty and determination to draw upon the facts and surrounding circumstances bearing on the effect of Blackmore's intoxication and whether he was incapable of forming the requisite specific intent. Engelhardt was thus not required to call on an expert to establish the correlation between Blackmore's level of intoxication and his inability to form the specific intent to commit the offense.

Additionally, after some initial interviews with potential witnesses, Blackmore told Engelhardt that he thought hiring Dr. Bendixen was "ridiculous. . . because it wasn't going to do us no good."

Furthermore, the trial court stated:

> The attendant circumstances indicating the defendant's statements just before the act and his ability to allegedly kick while being held back by someone else tend to disprove his inability to form the necessary intent. Furthermore, his statement to Deputy Sheriff Randy Petersen shortly after the crime and again his statements to the court during sentencing suggests his ability to recall or to remember may not be as blank as it purports it to be.

Thus, Blackmore's statements were indicative of his presence of mind and ability to form specific intent before and during the incident. In light of the trial court's reliance on Blackmore's own statements, we do not find Blackmore was prejudiced by Engelhardt's failure to call in an expert. *See Heaton v. State*, 420 N.W.2d 429, 432 (Iowa 1988) (denying postconviction application concerning charge of first-degree murder; held defendants

statements following arrest indicated he was aware of what had happened and "in view of the trial court's reliance on [defendant's] own statements which impeached his testimony [that he had] a blackout, we fail to see any prejudice caused by his attorney's failure to obtain the services of an expert.").

Perhaps most significant to our analysis in reviewing this claim for ineffective assistance of counsel, is the fact that Blackmore is unable to prove prejudice. That is, he failed to show that but for trial counsel's alleged error, the outcome would have been different. The evidence in this case indicates Blackmore asked others before the incident whether they would "like to see someone get the sh_ _ kicked out of them." Blackmore then shoved the victim, knocking off the victim's glasses. When the victim bent over to pick up his glasses, Blackmore kicked the victim in the eye, despite the attempt of one witness to hold Blackmore back. The damage Blackmore inflicted upon the victim's eye resulted in the victim receiving fifteen stitches. There were eyewitnesses who observed these events and testified consistently with each other.

We therefore find there is overwhelming evidence of Blackmore's guilt in this case, independent of counsel's actions. None of the claims of ineffective assistance of counsel establish that Blackmore was prejudiced by the actions of his defense counsel.

Having considered the arguments properly before us on appeal, and having evaluated the totality of the circumstances adduced from the record, we affirm the district court's

dismissal of Blackmore's application for postconviction relief and accordingly uphold Blackmore's conviction.

AFFIRMED.

Cady, C.J., concurs; Mahan, J., dissents.

MAHAN, J. (dissenting)

I respectfully dissent.

This appeal involves eight separate factual allegations providing the basis for the appellant's claim of ineffective assistance of counsel. These allegations are set out on page three of the majority decision. While there appears to be at least some merit to all of the allegations, those contending counsel failed to follow through with plea negotiations, appear at his own motion hearing, timely designate an expert, and attend closing arguments are the most troubling.[1]

This case is unusual in that two attorneys well-versed in the area of criminal law agreed to testify as expert witnesses on behalf of the appellant at the postconviction relief hearing. They stated their conclusions that representation was substandard.

Considering all of these factors, and taking into account the charge involved a forcible felony, one comes to the inescapable conclusion that counsel failed to perform an essential duty.

The majority decided this appeal on the prejudice issue. "The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App.

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[1] The crucial claim is not that defense counsel allowed a new associate to *make* the closing argument. The claim is that counsel did not even *attend* the closing argument.

1996). The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that but for the trial attorney's errors, the resulting conviction would have been different. "A reasonable probability is one sufficient to undermine confidence in the outcome." *Id.* at 102.

It is true none of the individual allegations, standing alone, would amount to prejudice. However, when viewed as a whole, I would find prejudice was established.