STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0406

Darryl S. Murphy,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 7, 2009
Affirmed
Randall, Judge[*]

Mille Lacs County District Court
File No. K9-03-906

Darryl Shane Murphy, OID #193570, 7600 525th Street, Rush City, MN 55069 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark J. Herzing, Assistant Mille Lacs County Attorney, Courthouse Square, 525 2nd Street S.E., Milaca, MN 56353 (for respondent)

Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

Appellant Darryl Shane Murphy was convicted of second-degree unintentional murder for stabbing a man to death, and was sentenced to 180 months in prison. On direct appeal, this court affirmed appellant's conviction and sentence. *State v. Murphy*, No. A04-926 (Minn. App. May 24, 2005), *review denied* (Minn. July 19, 2005).

In January 2007, appellant filed a pro se petition for postconviction relief raising issues including ineffective assistance of trial and appellate counsel, based on flawed jury instructions. The district court granted an evidentiary hearing at which appellant's trial and appellate attorneys testified. The district court thereafter denied relief, and this appeal followed.

The jury instructions that were given were not erroneous. The district court did not abuse its discretion in denying postconviction relief. Affirmed.

FACTS

On July 8, 2003, shortly after midnight, several Mille Lacs Tribal officers responded to the report of a disturbance at a residence. When the officers arrived, they found a man, whom they recognized as C.S., lying on the ground in a blood-soaked shirt. C.S. had been stabbed in the chest and died.

Several people were at the residence at the time, including appellant, his grandfather, his girlfriend, and J.F., who was C.S.'s girlfriend. The residence was owned by appellant's grandfather and appellant lived there with him. Based on statements made by several witnesses, police had reason to believe that appellant had stabbed C.S. during

an altercation inside the residence and had dragged C.S. outside into the yard. Although appellant denied stabbing C.S., he was charged with second-degree intentional and unintentional murder. Prior to trial, appellant notified the prosecution of his intent to claim self-defense.

At trial, several witnesses, including appellant's girlfriend and his grandfather, indicated that appellant had gone to J.F.'s aid after she and C.S. had gotten into a fight in the bedroom. When J.F. started screaming for C.S. to "get off of me, get off of me," appellant kicked in the door to the room.

J.F. testified that she, appellant, and C.S. had been drinking and smoking marijuana that evening. J.F. testified that she and C.S. started to fight after appellant went to bed. J.F. testified that when she started yelling at C.S. to get off of her, appellant broke down the door. J.F. claimed that she attempted to stop the two men from fighting and that she yelled at C.S. to go home, but that he refused to leave. J.F. remembered the men punching each other, but she never saw a knife and did not see how C.S. got stabbed. J.F. acknowledged that appellant knew that she and C.S. had a tumultuous relationship and that several weeks earlier, C.S. had beaten her so badly that she had been hospitalized.

Appellant testified that he broke down the door to the room when he heard J.F. yelling "get off of me, get off of me." C.S. was holding J.F. down, pulling her hair, and yelling at her. Appellant claimed that when he asked C.S. what he was doing, C.S. jumped up and started coming at appellant. Appellant testified that both men were throwing blows and wrestling, and that after a few minutes C.S. got winded and sat down

on the floor. Appellant claimed that as he tried to talk to J.F., C.S. got up and grabbed a knife. Appellant testified that C.S. lunged at him, and that he grabbed C.S.'s arm and twisted it, causing the knife to fall to the floor. Appellant picked up the knife and when C.S. attacked again, appellant stabbed him. Appellant claimed that he was in the corner of the room at the time and that retreat was not possible.

Two neighbors testified that they saw a man, whom they later identified as appellant, dragging a body through the yard. Appellant was yelling that he had stabbed and killed someone, and that he was dragging him down to the lake. The neighbors called 911.

D E C I S I O N

On appeal from the district court's denial of a petition for postconviction relief, we review issues of law de novo but our review of factual matters is limited to whether there is sufficient evidence in the record to sustain the court's findings. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The district court concluded that appellant was not entitled to postconviction relief because (1) he failed to challenge the jury instructions on direct appeal and his claim is partially barred by *Knaffla*; (2) the evidence presented at trial did not suggest that appellant had the ability to retreat or that retreat was a possibility; and (3) the language of the instruction given to the jury did not include a duty to retreat and the prosecutor never argued that appellant had such a duty.

I.

Appellant argues that the instruction given to the jury on self-defense misstated the law and denied him the right to present a defense. Although the instruction followed a

standard jury instruction on self-defense, appellant asserts that it erroneously implied that he was under a duty to retreat in his own home.

But the instruction did not use the term "retreat." The instruction specifically informed the jury that the decision to defend oneself or another must have been "such as a reasonable person might have made in light of the danger perceived *and the existence of any alternative way of avoiding the peril*." *See* 10 *Minnesota Practice*, CRIMJIG 7.05 (2006) (emphasis added). The instruction did not impose a duty to retreat on appellant, but merely required that he act reasonably under the circumstances. Retreat was never an issue under the facts of this case. Appellant testified that retreat was not a possibility because he was "cornered in the back . . . of the room [with the victim] comin' at me." Retreat was not an issue at trial and was not argued to the jury. The instruction as given did not misstate the law and did not prejudice appellant.

II.

Appellant argues that his trial attorney was ineffective and that this claim is not barred by *Knaffla*. To show ineffective assistance of counsel, appellant must show that his counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of his trial would have been different. *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

Appellant's petition for postconviction relief alleged ten errors or omissions on the part of trial counsel. Those errors included (1) failure to discuss significant decisions with his client; (2) failure to move for suppression of evidence; (3) failure to investigate and prepare for trial; (4) failure to research and understand specific cases relevant to

appellant's defense; (5) failure to maintain contact with appellant; (6) failure to object to fundamentally flawed jury instructions; (7) failure to request lesser-included jury instructions; (8) failure to seek disclosure of evidence; (9) failure to advise appellant of legal procedures encountered; and (10) failure to investigate the victim's violent reputation. On appeal, appellant does not address these claims, which relate largely to trial tactics and strategy. Instead, he focuses solely on the errors or omissions by counsel as they relate to the self-defense jury instruction.

Appellant asserts that his trial counsel failed to uncover and understand the relevant cases of *Glowacki* and *Carothers*, which make it clear that a defendant has no duty to retreat when a claim is made in defense of dwelling or defense of self or defense of another within a dwelling. *See State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001); *State v. Carothers*, 594 N.W.2d 897 (Minn. 1999). Appellant asserts that rather than tailoring the jury instructions to fit the facts of his case, trial counsel only relied on CRIMJIG 7.05. We agree that the facts here might have supported other self-defense jury instructions involving defense of dwelling, which are also set out in CRIMJIG 7.05, or a self-defense instruction patterned after CRIMJIG 7.06, which the jury instruction guide suggests may be used when "the defendant claims to have acted in self-defense but contends that the killing was accidental." 10 *Minnesota Practice*, CRIMJIG 7.05, at 114 n.1 (2006).

But, again, retreat simply was not an issue in this case. Trial counsel's failure to request a self-defense instruction more tailored to defense of dwelling or defense of self

or another within a dwelling can be second-guessed, but we cannot find any prejudice warranting a new trial.

III.

Appellant's postconviction petition alleges seven errors on the part of appellate counsel, which include (1) failure to consult with appellant; (2) failure to perform investigation; (3) failure to maintain contact with appellant; (4) failure to raise the issue of fundamentally flawed jury instructions; (5) failure to preserve the issue of flawed jury instructions; (6) failure to raise the issue of ineffective assistance of trial counsel; and (7) failure to maintain objective standards of reasonable care.

Claims of ineffective assistance of appellate counsel are not barred by *Knaffla* in a first postconviction appeal because they could not have been brought at any earlier time. *Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008). But to prevail on a claim of ineffective assistance of appellate counsel that is grounded on a claim that trial counsel was ineffective, appellant "'must first show that trial counsel was ineffective.'" *Id.* (quoting *Fields*, 733 N.W.2d at 468). Specifically, appellant must show that (1) "'counsel's representation fell below an objective standard of reasonableness'" and (2) "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

On direct appeal, appellate counsel did not raise any challenge to the effectiveness of trial counsel, even though appellant had identified that as an issue he believed should be raised. At the postconviction evidentiary hearing, appellate counsel stated that many

of her clients claim ineffective assistance of trial counsel and that she must make a determination as to the merits of such an argument after reviewing the record and transcript of the trial. In this case, she determined the issue would not be successful. Even if appellate counsel had challenged trial counsel's failure to either delete the challenged language in the jury instruction or to include language that made it clear that appellant had no duty to retreat, the verdict should not have been affected. Retreat was not an issue in this case and was not argued to the jury. We reject appellant's claim of ineffective assistance of counsel.

IV.

Finally, appellant alleged in his postconviction petition that he is entitled to a new trial because he was denied his right to due process based on (1) inaccurate jury instructions; (2) prosecutorial misconduct; (3) deficient representation by trial counsel; and (4) judicial bias. The district court did not make specific findings on these claims, and appellant does not specifically address these claims on appeal. Our review of the record reveals no support for these claims or explanation as to why these claims are not barred by *Knaffla*.

Affirmed.