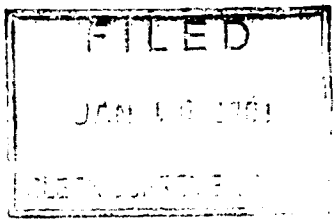
**IN THE COURT OF APPEALS OF IOWA**

No. 0-703 / 99-1566
Filed January 10, 2001

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**KEITH ROBERT BROWN,**
Defendant-Appellant.




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Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Brown appeals from the judgment and sentence entered upon jury verdicts finding him guilty of second-degree murder, willful injury, first-degree kidnapping, and conspiracy to commit willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Robert L. Cusack, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., Mahan, J., and Habhab, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

**HABHAB, S.J.**

Keith Brown appeals his conviction of second-degree murder, first-degree kidnapping, willful injury, and conspiracy to commit willful injury. We affirm.

***I. Background Facts and Proceedings.***

Brown was charged with these offenses in connection with the murder of Virgil Engelkens. The State's theory at trial was that Brown had orchestrated this killing in retaliation for the alleged rape of Brown's girlfriend, Jennifer Adams. The evening before the murder, Adams told Brown, John Pardee, and Teresa Chin that Engelkens had raped her. The next day two friends of these persons, Roy Holting and Tim O'Connor, drove Engelkens to an isolated area and shot him twice in the chest. Brown appeared at the scene shortly thereafter. The State's evidence consisted primarily of the testimony of Adams and Roy Holting, who testified that Brown had orchestrated the killing, paying both Holting and O'Connor for their respective roles. Brown, conversely, contended that he did not instigate, know of, or take part in the murder plot.

On the morning of trial, Brown filed a motion in limine asserting that any evidence that Brown was a drug dealer was irrelevant and, thus, should be excluded. As a result of this motion, the State was directed that "any evidence relating to the defendant as a drug dealer or selling drugs to any of the parties" was prohibited. At trial, however, the State elicited testimony from several witnesses to the effect that they had been doing drugs provided by Brown. Trial counsel did not object at the time this testimony was elicited, but raised the issue

in chambers the following morning so as not to draw the juries' attention to the evidence.

Also, during trial, autopsy photos of the victim were allowed into evidence over Brown's objection to their relevance.

Brown brings a plethora of interconnected arguments for consideration on appeal. First, he argues that the State violated the court's in limine order and that the court erred in admitting the autopsy photos into evidence. He also contends, in the alternative, that if we were to find the above two issues were not properly preserved for appeal, trial counsel was ineffective for failing to make the proper objections in a timely fashion. Further, Brown argues trial counsel was ineffective for failing to request jury instructions on the requirement of corroboration.

Brown also filed a pro se supplemental brief on November 6, 2000, roughly seven months after the original proof brief was filed. In this brief he argues that trial counsel was ineffective for failing to interview and present the testimony of Tim O'Connor. Brown provides the transcript of O'Connor's testimony in the trial of John Pardee, where O'Connor stated that he was instructed by Pardee to shoot Engelkens for reasons unrelated to the alleged rape of Adams. Brown contends that trial counsel was ineffective for failing to perform a proper investigation and for failing to bring vital testimony to the jury's attention. Iowa Rule of Appellate Procedure 13(d) provides as follows:

> An appellant may amend a required brief once within fifteen days after serving the brief, provided no brief has been served in response to it. . . . Any other or further amendments to the briefs

> may be made only with leave of the appropriate appellate court. An amendment may be conditionally filed with a motion for leave.

As allowed by this rule, Brown requested leave to file this brief with our court. We have decided to grant Brown such leave and, therefore, will consider the additional contention below.

***II. Error Preservation.***

We first conclude, as Brown seems to have foretold, that error was not properly preserved on his arguments that the State violated an in limine order and that the trial court erred in admitting autopsy photographs into evidence.

First, we find that Brown was required to timely object to the State's questioning relative to the source of the witnesses' drugs in order to preserve error. The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *Twyford v. Weber,* 220 N.W.2d 919, 922-23 (Iowa 1974). It is generally recognized that a motion in limine does not preserve error since error does not occur until the matter is presented at trial. *State v. Frazier*, 559 N.W.2d 34, 39 (Iowa App. 1996). To preserve error, a timely objection should be made when the evidence that was the subject of the motion in limine is offered at trial. *State v. Latham*, 366 N.W.2d 181, 183 (Iowa 1985); *State v. Edgerly,* 571 N.W.2d 25, 29 (Iowa App. 1997). Because Brown failed to make this objection in a timely fashion, this issue is not preserved for our review. See *State v. Davis*, 240 N.W.2d 662, 663 (Iowa 1976) (A defendant who has received a favorable ruling on a motion in limine must provide the trial court an opportunity to rule on any alleged prosecutorial violation of such order in order to preserve error.).

Second, we also decline to address Brown's contention that the court erred in admitting the autopsy photographs into evidence. Brown objected to this evidence at trial based on its relevancy, but contends on appeal that there is a special exception to the relevancy based on the fact that Brown was not present at the murder scene during the killing. This argument was not made at trial; thus it also was not preserved for our review. *See State v. Nelson*, 329 N.W.2d 643, 646 (Iowa 1983) (We do not review issues which are raised for the first time on appeal.).

***III. Ineffective Assistance of Counsel.***

Brown contends trial counsel was ineffective in the following respects: (1) in failing to request jury instructions on the requirements of corroboration of accomplice testimony and corroboration of the defendant's confession; (2) in failing to make a timely objection to the State's violation of the in limine order prohibiting evidence of Brown as a drug dealer; (3) in failing to make a proper investigation and present the exculpatory testimony of O'Connor; and (4) in failing to object to the relevance of the autopsy photos based on Brown's absence during the murder.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve

ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the strong presumption his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test, it must be shown that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

First, we address Brown's claims of ineffective assistance of counsel for failing to request jury instructions on the requirements of corroboration of accomplice testimony, for failing to make a timely objection to the State's violation of the in limine order, and for failing to make a proper investigation. Generally, ineffective assistance of counsel claims are preserved for postconviction relief proceedings to allow trial counsel an opportunity to defend the charge. *Atley,* 564 N.W.2d at 833. Where the record is inadequate to permit us to resolve the claim, it is preserved in order to provide the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Fox,* 491 N.W.2d 527, 535 (Iowa 1992). We find that the record is insufficient for us to resolve these issues. Brown's ineffective assistance claim is accordingly preserved for possible postconviction proceedings.

Second, we find Brown's contention regarding trial counsel's duty to request an instruction requiring corroboration of the defendant's confession to be without merit. To warrant a conviction, a confession of the defendant that is not made in open court must be supported by corroborating evidence. Iowa R. Crim. P. 20(4). Brown's statement to police, however, did not constitute a confession because he denied knowledge or involvement in the crime. *See State v. Schomaker*, 303 N.W.2d 129, 130 (Iowa 1981) (To constitute a confession the admissions or declarations must amount to an acknowledgement of the guilt of the offense charged.). Therefore, trial counsel was under no duty to request a jury instruction requiring corroboration of Brown's statement. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) ("Counsel is not incompetent in failing to pursue a meritless issue.").

Finally, we address Brown's argument that counsel was ineffective for failing to make the objection that the autopsy photos were irrelevant to Brown's involvement in the crime because he was not present during the murder. Our supreme court has repeatedly rejected such a distinction. *See State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984) (finding that "[e]ven if defendant's involvement in the crime was that of an aider and abettor, the intent of the primary perpetrator is a material element for the jury's consideration"); *State v. Miller*, 142 N.W.2d 394, 396, 259 Iowa 188, 191 (1966) (finding that because autopsy photographs were corroborative of what the witnesses had described and would ordinarily be admissible, their admission into evidence against an accomplice not present at the scene did not constitute reversible error). We accordingly find trial counsel

had no duty to make such objection. See State v. Rice, 543 N.W.2d 884, 888 (Iowa 1996) (A claim of ineffective assistance cannot be predicated upon counsel's failure to make a meritless objection.).

The judgment of the district court is affirmed in its entirety.

**AFFIRMED.**