

IN THE COURT OF APPEALS OF IOWA

No. 6-219 / 94-1354

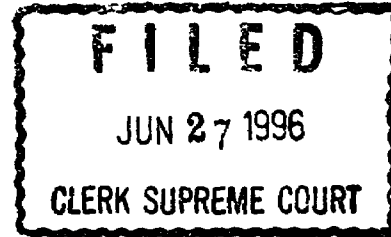
SIMON CURTIS TUNSTALL,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Woodbury County, Robert C. Clem,
Judge.

Appeal from denial of application for postconviction relief. **AFFIRMED.**

Michael K. Williams, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Charles N. Thoman, Assistant
County Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Streit, JJ.

HABHAB, P.J.

Applicant-appellant Simon Tunstall appeals from the denial of his application for postconviction relief. He argues: 1) his trial counsel was ineffective in failing to voir dire the jury after it was discovered there was a newspaper in the jury room; 2) the trial court erred in failing to voir dire the jury after it was discovered there was a newspaper in the jury room; and 3) his trial counsel was ineffective in failing to introduce a deposition to impeach hearsay evidence. We affirm.

Tunstall was convicted of first-degree murder and first-degree burglary in violation of Iowa Code sections 707.1, 707.2(2), 713.1, and 713.3 (1985). On the day after the trial had commenced, Duane Hoffmeyer, counsel for one of Tunstall's co-defendants, walked by the jury room and saw a juror reading a newspaper. Hoffmeyer recognized the paper as a copy of the Sioux City Journal. He could not specify that the juror he saw reading the newspaper was a juror assigned to Tunstall's murder case. That day's edition of the Sioux City Journal carried an extensive front and back page article regarding Tunstall's trial. Hoffmeyer observed the juror was reading the inside pages of the paper, not the front or back pages. He could not tell if the juror was reading that day's paper or one of a prior date.

Hoffmeyer later informed the court about his observation. He made a motion for a mistrial in which Tunstall's counsel joined. There was no request by counsel to voir dire the jury regarding the newspaper, nor did the trial court conduct its own voir dire to determine whether any of the jurors had been exposed to media coverage

regarding the trial. The motion for mistrial was denied.

At trial a police officer testified as to hearsay statements made by Dennis Jackson. Counsel for a co-defendant and Tunstall's counsel objected to the admissibility of the statements on various hearsay grounds, but they were admitted as excited utterances. A deposition of Jackson had been taken prior to trial, but it was not offered into evidence.

Tunstall's trial counsel represented him on appeal, and Tunstall's conviction was affirmed. Tunstall, represented by different counsel, filed an application for postconviction relief. The district court rejected Tunstall's claims and dismissed his application.

I. Voir Dire of Jury. Defendant argues his trial counsel was ineffective in failing to request voir dire of the jury following the discovery of the newspaper in the jury room. While defendant does not expressly state how this matter was preserved for postconviction review, we note he was represented by the same attorney at trial and on direct appeal, and the ineffectiveness of appellate counsel can constitute a sufficient reason for not raising an issue prior to a postconviction action. *See Frank v. State*, 376 N.W.2d 637, 640 (Iowa App. 1985).

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). Tunstall has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty, and, as a result, he was prejudiced. *Id.* To demonstrate prejudice, Tunstall must

prove there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A court need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa App. 1987).

[T]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. 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.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2070, 80 L. Ed. 2d 674, 700 (1984)).

Defendant argues his counsel was ineffective in failing to voir dire the jurors. Tunstall did not call any of the jurors to testify at his postconviction trial, nor did he submit affidavits from any of the jurors. There is no evidence to establish any of the jurors in his trial actually read the February 5 Sioux City Journal and was prejudiced by the article about Tunstall's trial. Tunstall has failed to prove any prejudice resulting from the absence of voir dire by his counsel.

Tunstall attempts to circumvent his obligation to prove prejudice by arguing this is a case in which prejudice should be presumed. We reject this argument.

Prejudice is presumed where there has been an actual or constructive denial of the assistance of counsel or counsel was burdened by a conflict of interest. *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696. Where there are no juror affidavits or testimony indicating jurors have been exposed to allegedly prejudicial media reports, we will not grant postconviction relief based on mere speculation of prejudice. *See Foster v. State*, 378 N.W.2d 713, 720 (Iowa App. 1985). This is consistent with the presumption jurors comply with admonishments not to expose themselves to publicity about the trial in which they are sitting as jurors. *See State v. Aldape*, 307 N.W.2d 32, 45 (Iowa 1981).

Tunstall failed to carry his burden to prove prejudice and demonstrate a reasonable probability sufficient to undermine confidence in the outcome of the trial. His claim of ineffective assistance due to the failure to voir dire must fail. Assuming, without deciding, Tunstall has preserved his claim that the trial court erred in not conducting its own voir dire, we also reject this claim. Contrary to Tunstall's argument, the decision of *State v. Bigley*, 202 N.W.2d 56, 58 (Iowa 1972), did not mandate the trial court voir dire the jurors. None of the defense counsel requested the court to voir dire the jurors. The State made a request in the alternative when it asked the court to "overrule the motion [for a mistrial] or direct that further record be made regarding what impact that news account would have on the jury" (emphasis added). The court denied the motion for a mistrial and was under no obligation to proceed to voir dire the jury.

II. Dennis Jackson Deposition. Tunstall contends his trial counsel was ineffective in failing to offer Dennis Jackson's deposition into evidence. Prior to the murder, Jackson had made statements to a police officer which implicated Tunstall. The officer testified at trial about the statements Jackson had made. The hearsay statements were admitted as excited utterances.

Defendant argues inconsistencies between Jackson's deposition testimony and the "excited utterances" he made to the police officer would have impeached the officer's testimony and diminished its value. The State contends the inconsistencies are minor in nature. The State additionally argues the introduction of Jackson's deposition would have damaged, rather than helped, Tunstall's case because in his deposition Jackson identified Tunstall as one of the alleged perpetrators who came to his motel room looking for the victim prior to the murder.

We note improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). We agree with the State defendant has failed to prove prejudice. The impeachment value of the deposition was offset by its damaging implication of Tunstall in the crime. Tunstall has not established a reasonable probability of a different outcome had the deposition been offered into evidence.

AFFIRMED.