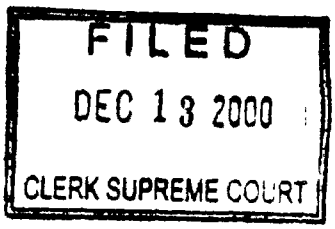
IN THE COURT OF APPEALS OF IOWA

No. 0-591 / 99-1312
Filed December 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARNELL JAMILLIE WILLIAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Defendant appeals his convictions for first-degree robbery and first-degree murder. **AFFIRMED.**

William T. Morrison of Locher & Morrison, Mason City, for appellant.

Thomas J. Miller, Attorney General, and Richard J. Bennett, Douglas D. Hammerand, and Laura Roan, Assistant Attorneys General, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

HECHT, J.

On appeal following his convictions for first-degree robbery and first-degree murder, Darnell Williams contends the court erred in (1) failing to instruct the jury as to the unreliability of cross-racial identification, (2) failing to suppress the identification testimony of a particular witness, (3) allowing into evidence testimony about his reaction to a question regarding the crime, and (4) allowing into evidence testimony of his alleged drug use. He also argues the verdict was contrary to the law and the weight of the evidence, the imposition of a $150,000 fine was unconstitutional, and he was provided ineffective assistance of counsel in a number of respects. We affirm.

I. Factual Background and Proceedings. On October 12, 1998, the State filed a two count trial information charging Williams with murder in the first degree and robbery in the first degree. The charges stemmed from the robbery and shooting death of Bruce Vrchota in his home in the early morning hours of July 27, 1998. At approximately 1 a.m. on July 27, Williams was attending a party at Vanette Taylor's house. Velena Taylor, Vanette's sister, was also at the party and observed Micheal Williams enter the house and then leave quickly. She testified Darnell Williams left the party approximately five minutes after Micheal Williams departed.

A short time later, three men dressed in dark clothing arrived near Bruce Vrchota's home. Two of the men entered the house, apparently looking for drugs and a cash box Vrchota kept on the premises. Vrchota's son, Shelley, was in the house at the time. During the course of the incident, Micheal Williams shot and

killed Vrchota. Shelley positively identified Micheal Williams as the man wielding the gun and the one who shot his father. He did not see the second man's face because Micheal Williams ordered Shelley to lay face down on the couch. Shelley was able to observe the back of the second man's neck and testified the second man in his house had dark skin, similar to that of an African-American. Mark Greiman also participated in the incident, but remained outside of the house when Vrchota was shot. After shots were fired, Robert Sansgaard, a friend of one of Vrchota's neighbors, observed the three men running from the scene. The last man to run away from the house turned and fired a shot at Sansgaard.

The three men arrived at Sheyanne Oudekerk's house at approximately 2:00 a.m. She knew Micheal Williams and Greiman, and later identified Darnell Williams in a photo array as the man with them the night of the murder. She drove all three men to Guy Fisher's apartment where Micheal Williams hid the gun used to kill Vrchota. Micheal Williams and Greiman were arrested separately soon after the incident. Darnell Williams was arrested on September 28, 1998. The three men were tried separately.

Trial in this matter commenced on July 7, 1999, and the jury returned verdicts of guilty on both counts. On August 13, 1999, the district court sentenced Williams to life in prison for first-degree murder and twenty-five years for the first-degree robbery charge, to be served concurrently. The district court also ordered him to pay restitution in the amount of $150,000 to Vrchota's estate. Williams appeals.

II. Standard of Review. We review alleged error regarding the submission of or refusal to submit jury instructions for correction of errors at law. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). When assessing an alleged violation of a constitutional right, we review de novo the totality of the circumstances as shown by the entire record. *State v. Brown*, 612 N.W.2d 104, 108 (Iowa App. 2000). Our standard of review concerning the admission of hearsay evidence is for correction of errors of law. *State v. Tornquist*, 600 N.W.2d 301, 303 (Iowa 1999). We review the district court's rulings on the admissibility of evidence for abuse of discretion. *See State v. Query*, 594 N.W.2d 438, 443 (Iowa App. 1999). When reviewing a challenge to the sufficiency of the evidence, we will uphold a verdict where there is substantial evidence in the record tending to support the charge. *State v. Dible*, 538 N.W.2d 267, 270 (Iowa 1995). We review claims of ineffective assistance of counsel de novo. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999).

III. Instruction on Cross-Racial Identification. Williams contends the district court erred when it refused to incorporate his suggested revisions to the uniform jury instruction covering the reliability of eyewitness identification. At trial in this matter, Williams called an expert witness, Dr. Thomas Sannito, who testified as to the infirmities of cross-racial identification. Sannito's testimony was introduced to call into question the reliability of Oudekerk's identification of Williams as the man accompanying Micheal Williams and Greiman to her apartment immediately after the murder. Oudekerk is Caucasian and Williams is African-American. Sannito testified it is very difficult for people of one race to

identify members of another race. He indicated several studies have shown eyewitnesses have difficulty distinguishing how members of another race are different and how they are the same.

The district court submitted Jury Instruction 12, which is the same as Uniform Jury Instruction 200.45:

> Eyewitness Identification. The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
>
> 1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.
>
> 2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.
>
> 3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.
>
> 4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

The district court refused to add to the stock instruction the following additional language proposed by defense counsel: "If the witness and the person sought to

be identified are different races, the difficulty witnesses have in accurately identifying persons of different races."

When jury instructions are challenged on appeal, we review them to determine whether they correctly state the law and are supported by substantial evidence. *State v. Thompson,* 570 N.W.2d 765, 767 (Iowa 1997). Trial courts should generally adhere to the uniform instructions. *State v. Mitchell,* 568 N.W.2d 493, 501 (Iowa 1997). Trial courts have discretion to modify or rephrase the uniform jury instructions to meet the precise demands of each case as long as the instructions fully and fairly embody the issues and applicable law. *Dudley v. GMT Corp.,* 541 N.W.2d 259, 261 (Iowa App. 1995). Any error in jury instructions must be prejudicial to warrant reversal. *State v. Holtz,* 548 N.W.2d 162, 164 (Iowa App. 1996). We determine the district court did not abuse its discretion by refusing to amend the uniform jury instruction to reflect issues of cross-racial identification. The district court did allow Williams's expert to testify at great length regarding the complexities of eyewitness identifications. Defense counsel was permitted to raise these issues in his closing argument. In addition, the district court gave an instruction regarding eyewitness identification that adequately covered the issues raised at trial. We conclude Williams suffered no prejudicial error as a result of the district court's refusal to amend the Uniform Jury Instructions.

IV. Motion to Suppress. Williams next contends the district court erred in failing to suppress Oudekerk's identification of him because it was the product of an impermissibly suggestive photo array. Because Williams raises a

constitutional issue, we make an independent evaluation of the totality of the circumstances. *State v. Taft,* 506 N.W.2d 757, 762 (Iowa 1993). We employ a two-step process to analyze challenges to out-of-court identifications. *Id.* First, we consider whether the State employed an impermissibly suggestive procedure. *State v. Holderness,* 301 N.W.2d 733, 738 (Iowa 1981). Second, if such an impermissibly suggestive procedure was used, we then determine whether, under the totality of circumstances, the procedure created a very substantial likelihood of irreparable misidentification. *Id.* The critical question under the second step is whether the identification was reliable. *State v. Zahner,* 545 N.W.2d 337, 339 (Iowa App. 1996). The factors to be used in assessing reliability are: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of her prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *State v. Lasage,* 523 N.W.2d 617, 620 (Iowa App. 1994).

Police officers showed two photo arrays to Oudekerk following the murder. The first was on August 6, 1998, and contained six pictures. Oudekerk indicated she knew five or six of the men in the pictures from her employment as a bartender. Williams was not pictured on the photo array and Oudekerk did not identify any of the men as the third man at her home the night of the murder. Oudekerk viewed a second photo array on September 27, 1998. That array also contained six pictures, including two photographs that had been in the first array.

Williams's picture was among the six and Oudekerk immediately identified him, saying she was eighty to ninety percent sure he was the third man.

We must first consider whether the procedure used was impermissibly suggestive. Williams argues the photo arrays were impermissibly suggestive because Oudekerk knew several of the men pictured in the first array, and because two of the men appeared in both of the arrays. We conclude these facts did not render the photo arrays impermissibly suggestive. The record shows the arrays were prepared using standard police procedures and contained pictures of men who were similar in skin tone, hairstyle, build, and age. While two of the men were pictured in both arrays, different officers prepared the arrays and the second officer testified he was not aware he was using some of the same pictures contained in the first array.

Williams also contends the array was impermissibly suggestive because Oudekerk knew he had been arrested for the crime before she saw the second photo array and she had seen him the day she identified him in the second array. We fail to understand how these facts show the second photo array was impermissibly suggestive or the identification was less reliable. Oudekerk had the opportunity to observe the third man at her apartment and in her car when she drove them to Fisher's apartment. Although the identification was two months after the crime, she identified Williams immediately, stating she was eighty to ninety percent sure he was the third man. She again identified him at trial. As we have determined the photo arrays were not impermissibly suggestive and the identification was reliable, the likelihood of "irreparable misidentification"

was not substantial. The district court did not err in denying the Williams's motion to suppress Oudekerk's identification of him as the third man.

V. Admission of Hearsay Evidence. Williams argues the district court erred by overruling his motion in limine and admitting testimony from Special Agent William Basler regarding statements made during his interrogation. The State argues Williams failed to preserve error on this issue because the evidence sought to be excluded in his motion in limine was introduced at trial without objection. Ordinarily, any error resulting from the court's ruling on a motion in limine is not preserved unless a timely objection is made when the evidence that was the subject of the motion in limine is offered at trial. *State v. Edgerly,* 571 N.W.2d 25, 29 (Iowa App. 1997). However, a defendant is not required to object at trial if the prior ruling on the motion in limine "amounts to an unequivocal holding concerning the issue raised." *State v. Delaney,* 526 N.W.2d 170, 177 (Iowa App. 1994). We conclude the district court's ruling on the motion in limine was an unequivocal holding as to the admissibility of the evidence and therefore, this issue has been preserved for our review.

Williams specifically objects to the following colloquy between the prosecutor and Special Agent Basler:

> Q: Did you talk to the Defendant about Mark Greiman? A: Yes, I did.
>
> Q: What did you say? A: I told Mr. Williams that Mark Greiman had been charged with first-degree murder in regards to this case and that possibly all Mr. Greiman did was drive the car that night.
>
> Q: How did the Defendant react to that? A: He had a fairly substantial reaction. I remember him sitting back with a look of shock and surprise on his face about the information regarding Mr. Greiman just being in the car.

> Q: And would you describe for the jury when you say a substantial reaction, how that appeared to you? A: I was writing notes as I mentioned earlier. So I didn't see all of his reaction. But when I glanced up at him, he had sat back in his chair and appeared to be surprised about the information that I had just stated to him.
>
> Q: Did the Defendant make some statements after that about lifting weights? A: Yes, he did.
>
> Q: What did he say? A: Mr. Williams told me that if he was going to be going to prison that he had better started lifting weights.
>
> Q: Did he ask about any educational opportunities? A: Yes.
>
> Q: What did he say? A: Mr. Williams mentioned [–] kind of thinking out loud – it appeared that he was wondering what educational opportunities would be available to him in prison.

Williams claims this testimony of Basler included a hearsay statement made by Greiman: the assertion he only drove the car on the night of the murder. Hearsay is a statement, other than one made by the declarant, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 801. We find no merit in Williams's contention. Basler's words did not assert *Greiman* said he was the driver of the car. Basler's statement was not communicated as an assertion of Greiman. Furthermore, the statement was not offered to prove the truth of the matters asserted, namely Greiman had only a limited role in the incident and had been charged with first-degree murder. Basler's statement was offered to show its effect on Williams, which Basler described as shock and surprise.

When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay. *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986); *State v. Coburn*, 315 N.W.2d 742, 746 (Iowa 1982); *State v. Nowlin*, 244 N.W.2d 596, 600 (Iowa 1976). For a

statement to be admissible as showing responsive conduct, however, it must not only tend to explain the responsive conduct but the conduct itself must be relevant to some aspect of the State's case. *State v. Mitchell,* 450 N.W.2d 828, 832 (Iowa 1990). Agent Basler's statement was appropriately offered to show Williams's reaction to Basler's theory about Greiman's role in the murder and robbery. In addition, it was offered to explain Williams's responsive conduct in asking the officers if there were educational opportunities in prison and stating he should start lifting weights to get ready to go to prison. The district court did not err by denying Williams's motion in limine.

VI. Prior Bad Acts Evidence. Williams next contends the district court abused its discretion by allowing the admission of testimony of Greiman's girlfriend that she and Greiman purchased crack cocaine from Williams. Iowa Rule of Evidence 404(b) provides evidence of "other crimes, wrongs or acts" is inadmissible to prove the defendant acted in conformity with the character the acts may show, but it is admissible for other purposes, such as to prove motive, identity, or knowledge. *See* Iowa R. of Evid. 404(b). The exceptions to rule 404(b) are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. *State v. Aricivia,* 495 N.W.2d 364, 367 (Iowa App, 1992). Evidence of prior bad acts is admissible if: (1) the evidence is relevant to establish a legitimate issue in the case; and (2) there is clear proof the individual against whom the evidence is offered committed the prior bad act. *State v. Most,* 578 N.W.2d 250, 253 (Iowa App. 1998). Commission of prior acts need not be established beyond a

reasonable doubt. *State v. Spargo*, 364 N.W.2d 203, 210 (Iowa 1985). Relevant prior bad acts evidence may nevertheless be excluded if its probative value is outweighed by its potential for unfair prejudice. *See* Iowa R. Evid. 403.

The State argues the evidence was admissible to show Williams's connection with Greiman, a fact Williams denied in his interrogation, therefore supporting the State's theory Williams was the third man with Micheal Williams and Greiman on the night of the murder. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Iowa R. Evid. 401. The fact Williams sold Greiman and his girlfriend crack cocaine is relevant to show it is probable Williams and Greiman knew one another and tends to prove they may have been jointly involved in Vrchota's murder and the robbery of his home. The evidence is also relevant to show it is likely Williams was the third man at Oudekerk's apartment the night of the murder.

Even if prior bad acts evidence is relevant, we must consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Alderman*, 578 N.W.2d 255, 258 (Iowa App. 1998). In making this determination, we consider the following factors: (1) the actual need for the evidence in view of the issues and the other available evidence; (2) the strength of the evidence showing the prior bad acts were committed by the accused; (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven; and (4) the degree to which the jury

will probably be roused by the evidence improperly. *State v. Zeliadt,* 541 N.W.2d 558, 562 (Iowa App. 1995). The State had an actual need for evidence that established a connection between Williams and Greiman. As argued above, the existence of a prior relationship between Greiman and Williams tended to prove Williams was the third man involved in the incident. The State needed evidence to corroborate Oudekerk's identification of Williams, which was subject to multiple attacks by defense counsel. The evidence was strong that Williams actually provided crack cocaine to Greiman and his girlfriend. The evidence strongly supports the inference Williams and Greiman knew each other and they were involved in drug transactions together. In turn, this evidence tends to prove Williams and Greiman would be more likely to participate in a crime motivated by the desire to obtain drugs and money.

Finally, we must consider whether evidence Williams sold crack cocaine would improperly "rouse" the jury. The State argues the evidence would not incite the jury because the defendant himself introduced evidence showing he was a marijuana user in an attempt to explain why his fingerprints were found in the victim's home. Williams maintains evidence of crack cocaine use is "far more prejudicial and inflammatory than admitting marijuana use." While it may be true cocaine use is marginally more prejudicial than marijuana use, we must weigh the probative value of the evidence against its prejudicial effect. *See State v. Nelson,* 480 N.W.2d 900, 904 (Iowa App. 1991). Considering all of the relevant factors, we determine the probative value of the evidence outweighs its

prejudicial effect. The district court did not abuse its discretion by admitting prior bad acts evidence at Williams's trial.

VII. Sufficiency of the Evidence. Williams next claims the evidence produced at trial was insufficient to support his convictions for first-degree murder and first-degree robbery. "A jury verdict is binding upon this court, and we must uphold the verdict unless the record lacks substantial evidence to support the charge." *State v. Arne,* 579 N.W.2d 326, 327-28 (Iowa 1998). In considering a challenge to the sufficiency of the evidence, we review all the evidence to determine whether a rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt. *See State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). Our review of the evidence is made in a light most favorable to the jury's verdict. *See State v. Knox,* 536 N.W.2d 735, 741 (Iowa 1995). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *Anderson,* 517 N.W.2d at 211. The credibility of witnesses, in particular, is for the jury: "[t]he jury is free to believe or disbelieve any testimony as it chooses." *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993).

Williams argues there was insufficient evidence to convict him of first-degree murder and first-degree robbery because the State failed to prove (1) he was the third man with Micheal Williams and Greiman on the night of the incident; (2) he aided and abetted in the commission of the robbery; and (3) the shooting which resulted in Vrchota's death could have been reasonably expected to occur during the commission of the robbery.

The record indicates there was sufficient evidence to show Williams was the third man involved in the robbery and shooting at the Vrchota house. Witnesses placed Williams in the presence of Micheal Williams immediately before and after Vrchota's murder. Velena Taylor testified she saw Williams and Micheal Williams at a party together shortly before the robbery and murder took place. Oudekerk positively identified Williams as the man with Micheal Williams and Greiman at her apartment immediately after the incident. Greiman's girlfriend testified Williams knew Greiman and the day after the murder, she and Greiman found a distinctive necklace belonging to Williams in Micheal Williams's car. Williams also made several admissions during his police interrogation. He stated if he was going to prison, he should start lifting weights and then inquired about whether there were educational opportunities in prison. This testimony is buttressed by the fact Williams's fingerprints were found in Vrchota's house. The record contains sufficient evidence for a reasonable juror to conclude Williams was the third man involved in the robbery of Vrchota's house and the resulting murder.

Williams also argues there was insufficient evidence showing he knowingly aided and abetted Micheal Williams in committing the robbery. Aiding and abetting in a crime occurs when a person assents to or lends countenance and approval to another's criminal act either by active participation or by encouraging it in some manner prior to or at the time of commission. *State v. Wedebrand,* 602 N.W.2d 186, 189 (Iowa App. 1999) (citing *State v. Lott,* 255 N.W.2d 105, 107 (Iowa 1977)). The State must also prove the aider and

abettor's participation or encouragement was done with the knowledge of the act. *State v. Speaks,* 576 N.W.2d 629, 632 (Iowa App. 1998). We conclude the State provided substantial and sufficient evidence against Williams to allow the jury to determine he was guilty of aiding and abetting first-degree robbery and first-degree murder. A reasonable juror could find from the evidence in the record Williams entered the Vrchota home in the middle of the night, dressed in black. He remained in the house after Micheal Williams drew a gun and ordered Bruce Vrchota into the room containing a cash box. Acting on orders from Micheal Williams, he stayed and watched over Vrchota's son, who was face down on the couch in the living room, until the shots were fired. After fleeing the house, he remained with Micheal Williams and Greiman as they drove away from the scene, abandoned the car, went to Oudekerk's apartment, and received a ride to another apartment where Micheal Williams hid the gun.

Finally, Williams contends the shooting death of Vrchota was not a foreseeable result of the robbery and the evidence was insufficient to convict him under a joint criminal conduct theory of liability. Iowa's joint criminal conduct statute provides:

> When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

Iowa Code § 703.2 (1997). The elements for imposing joint criminal liability are: (1) the defendant must be acting in concert with another; (2) the defendant must

knowingly be participating in a public offense; (3) a "different crime" must be committed by another participant in furtherance of defendant's offense; (4) the commission of the different crime must be reasonably foreseen. *See State v. Hohle,* 510 N.W.2d 847, 848 (Iowa 1994). "In furtherance of" is not limited to acts done to promote or advance the underlying crime, but includes acts done "while furthering that offense." *State v. Satern,* 516 N.W.2d 839, 844 (Iowa 1994).

Williams and Micheal Williams entered Vrchota's house in the middle of the night, dressed in black. Vrchota was known for his successful marijuana growing business and his electronics repair business. Vrchota was also known to keep cash from his businesses in his house. Greiman, a friend of Vrchota's, was acquainted with both Williams and Micheal Williams through various drug transactions. Greiman owed Micheal Williams money from previous cocaine sales. From the evidence presented at trial, a jury could infer Williams knew Micheal Williams was carrying a weapon when they entered the Vrchota house. In any event, Williams certainly knew Micheal Williams was carrying a gun when he pointed it at Vrchota and his son and ordered Williams to watch over Shelley when he took Vrchota to the office. A reasonable jury could conclude when Micheal Williams shot Vrchota in furtherance of the jointly planned and executed robbery, a separate crime was committed which could reasonably be expected under the circumstances. We conclude there was sufficient evidence to support Williams's convictions for first-degree robbery and first-degree murder.

VIII. Restitution. The district court ordered Williams to pay $150,000 in victim restitution pursuant to Iowa Code section 910.3B. He argues imposition of the fine violates his right to be free from excessive fines and constitutes a multiple punishment in violation of the Double Jeopardy Clause of the Fifth Amendment. The legislature expanded the scope of the restitution statute to require an offender convicted of a felony resulting in death to pay at least $150,000 in restitution to the victim's estate. Iowa Code § 910.3B(1). Our supreme court has recently determined after considering the nature of the offense, the resulting harm, and the great deference afforded to the legislature, section 910.3B does not on its face violate the Excessive Fines Clause of the Iowa and Federal Constitutions. *State v. Izzolena,* 609 N.W.2d 541, 551 (Iowa 2000). While the supreme court declined to decide whether the specific restitution amount violated the Excessive Fines Clause, it indicated the primary focus in making that determination should be "on the amount of the punishment as it relates to the particular circumstances of the offense." *Id.* (citing *United States v. Bajakajian,* 524 U.S. 321, 334, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314, 329 (1998)). Given the severity of the crimes committed by Williams, we determine the amount of restitution imposed by the district court bears a reasonable relationship to the circumstances in this case.

The supreme court also determined a challenge to section 910.3B on double jeopardy grounds has no merit because the restitution award was not imposed in a subsequent proceeding, but rather as a function of the original sentencing process, and therefore, was not a multiple punishment for the same

offense. *Izzolena*, 609 N.W.2d at 552. Likewise, we conclude Williams's double jeopardy claim is without merit.

IX. Ineffective Assistance of Counsel. Williams argues trial counsel was ineffective in the following respects: (1) by failing to preserve error as to his claims stemming from the motion in limine and the motion to suppress; (2) by failing to have the victim's house searched for defendant's fingerprints in rooms where the crimes did not occur; and (3) by failing to fully investigate other witnesses who could have possibly provided exculpatory testimony. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addressed the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *Johnson*, 604 N.W.2d at 673 (*quoting Strickland v. Washington*, 466 U.S. at 696, 104 S. Ct. at 2071, 80 L. Ed. 2d at 688). The burden is on the defendant to prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999). We affirm if either element is absent. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). As to the first element, Williams must prove trial counsel's performance was not within the normal range of competence. *See id.* As to the second element, Williams must prove counsel's error resulted in an actual and substantial disadvantage, creating a reasonable probability that but for the error,

the outcome of the proceeding would have been different. *See State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999).

We conclude the record is adequate to address Williams's first claim, whether trial counsel was ineffective for failing to preserve error on several issues on this appeal. We have addressed the merits of all of Williams's claims and have not disposed of them due to any failures of trial counsel to preserve error. Therefore, Williams cannot show trial counsel breached an essential duty by failing to preserve the claims for appeal and this claim of ineffective assistance of counsel must fail. As for Williams's remaining claims of ineffective assistance of counsel, we preserve them for possible postconviction relief proceedings to allow trial counsel an opportunity to defend the charge and to explain his conduct. *See State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa App. 1999).

AFFIRMED.