**IN THE COURT OF APPEALS OF IOWA**

No. 0-225 / 99-0551
Filed August 16, 2000

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CLERK SUPREME COURT

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

vs.

**MICHEAL TERRY WILLIAMS,**
Defendant-Appellant.

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

Defendant appeals from his convictions for first-degree murder and first-degree robbery. **AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.**

Maggi Moss and Jennifer Larson of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

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

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

**HECHT, J.**

On appeal from his convictions for first-degree murder and first-degree robbery, Micheal Williams contends the court erred by: (1) finding the evidence was sufficient to support either conviction; (2) denying a motion to suppress evidence of a photographic identification; (3) denying his motion for change of venue; (4) unconstitutionally imposing $150,000 in restitution; and (5) failing to inquire into a conflict of interest created by defense counsel's engagement to a county attorney. He also claims his trial counsel was ineffective in various respects. We affirm in part and remand with directions.

**I. Factual Background and Proceedings.** In the late evening of July 26, 1998, three men entered the home of Bruce Vrchota in Mason City, Iowa. Vrchota's son, Shelley, was in the house at the time. The intruders were apparently looking for drugs and a cash box Vrchota kept on the premises. During the course of the incident, one of the men shot and killed Vrchota. In the early morning hours of July 27, 1998, Shelley gave a statement to the police and identified one of the men by the nickname "Sug." The Mason City Police knew the nickname "Sug" referred to Williams. Investigator Frank Steams placed Williams's photograph in a photo array with five other men. Shelley identified Williams as one of the men who entered his father's home and the man who had brandished a gun during the robbery. Williams was arrested on July 28, 1998. His two codefendants were arrested shortly thereafter and tried separately.

On August 6, 1998, the State charged Williams with first-degree murder and first-degree robbery. Trial commenced on March 2, 1999, and continued for nine days. The jury returned a verdict finding Williams guilty of first-degree

murder and first-degree robbery. On April 2, 1998, the district court sentenced Williams to life in prison without the possibility of parole and ordered him to pay restitution in the amount of $150,000 to Vrchota's estate. Williams appeals.

**II. Standard of Review.** We review the conflict of interest, motion to suppress photo array identification, restitution, and ineffective assistance of counsel issues raised by Williams de novo as they are constitutional in nature. *See State v. Rater,* 568 N.W.2d 655, 657 (Iowa 1997); *State v. Vanover,* 559 N.W.2d 618, 627 (Iowa 1997). We review challenges to the sufficiency of evidence for errors at law. Iowa R. App. P. 4; *State v. Kraklio,* 560 N.W.2d 16, 17 (Iowa 1997). We review the district court's denial of a motion for the change of venue due to trial publicity de novo to determine whether the district court's decision demonstrates an abuse of discretion. *State v. Siemer,* 454 N.W.2d 857, 860 (Iowa 1990); *State v. Means,* 547 N.W.2d 615, 622 (Iowa App. 1996).

**III. Sufficiency of the Evidence.** Williams contends the evidence at trial was insufficient to convict him of first-degree murder and first-degree robbery. In evaluating a claim of insufficiency of the evidence, we view the evidence in a light most favorable to upholding the jury's verdict. *Kraklio,* 560 N.W.2d at 17. We give the State all reasonable inferences and presumptions the evidence will bear. *State v. Liggins,* 557 N.W.2d 263, 269 (Iowa 1996). The verdict is binding on us unless the record contains no substantial evidence to support it. *State v. Speaks,* 576 N.W.2d 629, 631 (Iowa App. 1998). Evidence is substantial if it could convince a rational trier of fact the accused is guilty beyond a reasonable doubt. *Id.*

Williams argues the State showed no direct evidence proving he was guilty of first-degree murder and first-degree robbery. However, substantial circumstantial evidence in the record supports a finding Williams was guilty of first-degree murder and first-degree robbery beyond a reasonable doubt. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). However, "the evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa App. 1999) (quoting *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)).

The evidence at trial supports the following facts: Williams and two other men discussed breaking into Vrchota's house in order to get marijuana and cash Vrchota was known to keep in his home. All three men dressed in black clothing. After midnight, Vrchota's son, Shelley, saw the three men enter his father's house. He later identified Williams to be the one who was carrying a gun. Shelley testified Williams pointed the gun to his face and told him not to look at him. Shelley also testified Williams demanded money and asked where Vrchota kept his cash. Williams forced Vrchota into another room. Shelley heard sounds of a desk drawer being opened and then heard two gunshots. The gun used to shoot Vrchota was later identified as a .9-millimeter handgun. The evidence indicated this gun had been in Williams's possession shortly before the shooting and was found hidden in Williams's brother-in-law's house. Williams's fingerprints were on the clip.

Williams points to inconsistencies in Shelley's testimony to support his claim of insufficiency of the evidence. He argues Shelley only saw the shooter's face for ten seconds that evening and could not accurately identify Williams as the gunman. He also argues Shelley first told the 911 operator he could not identify the men who broke into his father's home and then told police investigators he recognized the gunman as a person named "Sug." Williams also discusses the fact Shelley testified the shooter was holding the gun in his left hand while a police officer testified he observed Williams write using his right hand. Finally, Williams argues while there were fingerprints from another defendant found in the victim's home, his were not found at the scene.

A jury is free to believe or disbelieve any testimony it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *Liggins,* 557 N.W.2d at 269. Additionally, discrepancies in testimony, in and of themselves, do not preclude proof beyond a reasonable doubt. *See State v. Phanhsouvanh,* 494 N.W.2d 219, 223 (Iowa 1992); *State v. Forsyth,* 547 N.W.2d 833, 836 (Iowa App. 1996). A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory it may be deemed a nullity. *See State v. Smith,* 508 N.W.2d 101, 103 (Iowa App. 1993). We conclude the evidence is sufficient to convince a rational trier of fact Williams is guilty as charged beyond a reasonable doubt.

**IV. Motion for Change of Venue.** Williams contends the district court erred by denying his motion for a change of venue due to pretrial publicity. Pretrial publicity warrants a change of venue when "such a degree of prejudice exists in the county in which the trial is to be had that there is a substantial

likelihood a fair and impartial trial cannot be preserved with a jury selected from that county." Iowa R. Crim. P. 10(10)(b). Prejudice can be shown by publicity surrounding the trial which is so pervasive and inflammatory prejudice must be presumed or by actual prejudice on the part of the jury. *Means*, 547 N.W.2d at 622. In order to consider whether publicity has caused prejudice to the defendant, we consider whether the accounts:

> indicated the defendant is guilty; were factual and informative; were inflammatory in tone; contained editorial denunciations of the defendant; contained emotional stories regarding the defendant or the victim; and were inaccurate, misleading or unfair. We also look to see whether enough time had passed between the accounts and the trial date to dissipate any prejudicial effect of adverse publicity; whether panel members who professed knowledge of the case stated they could render an impartial verdict on the basis of the evidence presented at trial; and whether the trial judge sustained strikes for cause against jurors who stated they could not render an impartial verdict due to their prior knowledge.

*Id.*

After our review of the newspaper articles[1] provided to us on appeal, it appears the reporting of this case was mostly factual in nature. Trial in this matter commenced on March 2, 1999. The last newspaper article provided to us was dated January 29, 1999, more than a month before jury selection. The majority of the coverage occurred in the weeks following the July 27, 1998, murder and, as the district court observed, "[a]pproximately three-fourths of the articles were published within approximately 60 days following the incident," and "[p]ublicity since October 1, 1999, has been considerably less frequent."

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[1] Williams alleges there were also many television and radio reports concerning his case. However, these were not provided to us on appeal, and we do not consider their substance in resolving this claim.

Although most of the articles mentioned Williams's arrest in connection with the shooting, they focused primarily on the search and arrest of two other suspects. None of the articles indicated Williams was guilty of either the murder or the robbery. The reporting was neither sensational nor inflammatory. It was not unfair or misleading. We therefore conclude the district court did not abuse its discretion in denying the motion for a change of venue because Williams failed to show the publicity created such a degree of prejudice in Cerro Gordo County that there was a substantial likelihood a fair and impartial trial could not be had there.

**V. Motion to Suppress Identification.** Williams next asserts the district court violated his right to due process by denying his motion to suppress an eyewitness's identification of him. He argues his identification was the product of an impermissibly suggestive photo array. Because this is a constitutional claim, we make an independent evaluation of the totality of the circumstances. *State v. Taft,* 506 N.W.2d 757, 762 (Iowa 1993). To succeed on a claim a photographic lineup violated due process, Williams must establish: (1) the procedures were in fact impermissibly suggestive; and (2) the irregularities gave rise to a substantial likelihood of irreparable misidentification. *See State v. Caya,* 519 N.W.2d 419, 422 (Iowa App. 1994).

Williams relies primarily on the testimony of Officer Frank Stearns. Stearns conducted the interview with Shelley. Stearns indicated, after Shelley told him a person named "Sug" held a gun to his face, he created a photo array including "Sug," whom he knew to be Williams, and five other men. Before showing Shelley the photo array, Stearns read him the standard admonition and then informed him "Sug" would be in the array. At trial, Stearns admitted

disclosure to the witness that the suspect would be in the photo array was not standard procedure and was a mistake on his part. Shelley examined the photo array and quickly identified Williams.

We do not believe the officer's statement was impermissibly suggestive when considered with the surrounding circumstances. The photo array contained five other men who closely resembled Williams. Williams is African-American, with a very short haircut and facial hair. The skin tone and hairstyles of the other men were the same as or very similar to Williams's. The men all had on similar shirts and had similar facial features. Contrary to Williams's assertions, none of the pictures was placed in a more prominent position or significantly more close-up than the others. Accordingly, the likelihood of "irreparable misidentification" was not substantial. The district court did not err in denying the defendant's motion to suppress the identification.

**VI. 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 the jury convicted Williams of, first-degree murder and first-degree robbery, we determine the amount of restitution imposed by the district court bears a reasonable relationship to the circumstances of the offense.

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.

**VII. Ineffective Assistance of Counsel.** Williams also contends his trial counsel was ineffective in the following respects: (1) by failing to timely disclose to Williams a possible conflict of interest due to her engagement to a county attorney; (2) by failing to request reporting of voir dire; (3) by failing to hire an expert witness; and (4) by failing to file a notice of an alibi defense or call an alibi witness. Ineffective assistance of counsel claims often are not resolved on direct appeal but are preserved for postconviction proceedings to allow the preparation of an adequate record and to allow the attorney charged with ineffective assistance an opportunity to respond to the claim. *State v. Kinkead,* 570 N.W.2d

97, 103 (Iowa 1997). Accordingly, we preserve Williams's allegations of ineffectiveness for possible postconviction relief.

**VIII. Cumulative Error.** Williams asserts a general claim that when all of the errors are considered together, the cumulative effect deprived him of a fair trial. We have determined the district court did not err in its rulings on the issues addressed in Divisions III through VII of this opinion and therefore find no cumulative error associated with those issues. *See Wemark v. State,* 602 N.W.2d 810, 818 (Iowa 1999); *State v. Atwood,* 602 N.W.2d 775, 785 (Iowa 1999); *State v. Veal,* 564 N.W.2d 797, 812-13 (Iowa 1997).

**IX. Conflict of Interest Issue.**

*A. Relevant Factual Background.* Two members of the public defender's office in Cerro Gordo County represented Williams prior to and during trial and at the sentencing. After jury selection had been completed, the prosecutor notified the court one of the defense attorneys was engaged to be married to a member of the Cerro Gordo County Attorney's office. Defense counsel confirmed the information and indicated she informed Williams of the relationship the day before and he consented to the representation. The exchange was recorded as follows:

> THE COURT: Anything else to be made of record?
> MR. HAMMERAND [PROSECUTOR]: Yes, Your Honor. There was a concern about the county – Cerro Gordo County Attorney's Office being involved in this case because potential conflict of interest with – Ms. Hult is engaged to Carlyle Dalen, who is an Assistant Cerro Gordo County Attorney. As of yesterday, the Cerro Gordo County Attorney's Office has withdrawn from the case completely. The Attorney General's office is now handling the case for trial by itself. However, up until that point, so it's clear on the record, Gregg Rosenbladt, the Assistant County Attorney, was assisting me throughout this, trial

> information and up until yesterday. He did assist but from this point on, it will only be the Attorney General's Office involved in the trial of this case.
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> THE COURT: Ms. Hult, do you wish to make any record in that regard?
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> MS. HULT [DEFENSE ATTORNEY]: Your Honor, we have visited with Micheal Williams and he is aware of my relationship with Carlyle Dalen and also is aware of Katherine Evans's[2] relationship with Gregg Rosenbladt and Mr. Williams consents to that and wishes for the Public Defender's Office to continue to represent him. I don't believe as far as the County Attorney's Office withdrawing at this point for the purposes of trial would cure any potential conflicts since they had been involved up until this time but the parties' relationship has been disclosed to Mr. Williams and he does consent. So, I believe that we are in a position to proceed forward as his defense counsel.
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> THE COURT: That's correct, Mr. Williams?
> DEFENDANT: Yes, it is.
> THE COURT: All right. Anything else?
> MS. HULT: I have nothing further.
> MR. HAMMERAND: No, Your Honor.
> THE COURT: All right.

*B. Contentions of the Parties.* Williams contends he was deprived of his right to a fair trial and to due process of law by the district court's failure to inquire into the potential conflict of interest between his defense attorney and the county attorney's office. The State argues Williams cannot show an actual conflict of interest detrimentally affected his trial counsel's representation and we should affirm his convictions. In the alternative, the State argues the case should be remanded for a hearing on the conflict issue rather than remanded for a new trial.

*C. The Merits.* The Sixth-Amendment right to counsel contains a right to representation that is unimpaired by conflicts of interest or divided loyalties. *Atley v. Ault,* 191 F.3d 865, 869 (8th Cir. 1999). In general, a conflict exists when

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[2] Katherine Evans is also an assistant public defender in Cerro Gordo County but was not Leslie Hult's co-counsel when she represented Williams. It is unclear from the record whether she was involved in Williams's case at all.

an attorney is placed in a situation conducive to divided loyalties and can include situations in which the caliber of an attorney's services may be substantially diluted. *Id.* at 955 (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). When burdened by a conflict of interest, counsel "breaches the duty of loyalty, perhaps the most basic of counsel's duties" and therefore, fails to provide effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 689 (1984).

Williams argues the conflict of interest issue was raised in the trial court and the court erred in not conducting an inquiry into the matter. When a defendant raises a seemingly substantial complaint before trial regarding the defense attorney's conflict of interest or divided loyalty, the court must make a thorough inquiry into the factual basis for the defendant's complaint. *See Holloway v. Arkansas*, 435 U.S. 475, 488-91, 98 S. Ct. 1173, 1180-82, 55 L. Ed. 2d 426, 436-38 (1978); *see also State v. Thompson*, 597 N.W.2d 779, 784 (Iowa 1999) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S. Ct. 1708, 1717, 64 L. Ed. 2d 333, 346 (1980)). The district court has an independent interest in ensuring criminal trials are conducted within the ethical standards of the profession. It is also the court's duty to conduct proceedings in such a manner they appear fair to all who observe them. *Vanover*, 559 N.W.2d at 628.

We will first consider whether a timely and sufficient objection to the representation was made in the district court. While both the prosecution and defense counsel raised the issue with the court on the first day of trial, Williams and his defense attorney indicated Williams had consented to continued representation by the attorney. Williams relies heavily on *Atley* for the

proposition his case should be automatically reversed because the district court failed to conduct an inquiry. *See Atley,* 191 F.3d at 874. However, unlike Atley who was vocal regarding his dissatisfaction with his trial counsel, neither Williams nor his counsel expressed an objection to the district court regarding the possible conflict of interest. The district court's awareness of the possibility of a conflict of interest issue is not tantamount to an objection to representation by an attorney working under circumstances constituting an actual or potential conflict of interest. When asked if the information provided to the court by defense counsel was correct, he answered affirmatively. We conclude the record presented in this case does not require automatic reversal because no conflict of interest objection was raised by Williams or his counsel.

A defendant who makes no objection to counsel's representation at trial must demonstrate an actual conflict of interest adversely affected his lawyer's performance in order to establish a violation of the Sixth Amendment. *Cuyler,* 446 U.S. at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346. The conflict itself demonstrates a denial of the right to have the effective assistance of counsel. *State v. Duncan,* 435 N.W.2d 384, 386 (Iowa App. 1988). Thus, a defendant who shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *Id.* (citing *Cuyler,* 446 U.S. at 349, 100 S. Ct. at 1710, 64 L. Ed. 2d at 347). The Iowa courts have held a defendant must show there is a substantial possibility of a conflict of interest that affected the lawyer's representation. *Duncan,* 435 N.W.2d at 386; *Wycoff v. State,* 382 N.W.2d 462, 471 (Iowa 1986). In this case, Williams's defense attorney might not have pursued her client's interests "single-

mindedly" because of a relationship with an assistant county attorney or because of the relationship between her public defender-colleague's relationship and Mr. Rosenbladt, an Assistant County Attorney. *See Wood v. Georgia,* 450 U.S. 261, 271-72, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220, 231 (1981). From the record provided to us on appeal, however, we cannot determine whether defense counsel was influenced by these personal relationships.[3] If she was, William's Sixth-Amendment and due process rights were not respected. *See id.* Although we cannot determine whether an actual conflict existed in this case, the record does demonstrate the possibility of a conflict of interest.

The State next contends Williams cannot show a violation of his right to counsel because he consented to the representation and therefore waived any claim he might have had. To make a waiver valid, it must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *Duncan*, 435 N.W.2d at 387 (citing *Brady v. United States,* 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970)). Although the record indicates defense counsel stated Williams consented to the representation; and Williams voiced his affirmation on the record, we are unaware of the circumstances of that consent. The record is silent with respect to the specific factual disclosures made to Williams about the relationship between his attorney and her fiancé, an assistant county attorney. Likewise, we

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[3] We do note defense counsel had "an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest [arose] . . . ." *Cuyler,* 446 U.S. at 346, 100 S. Ct. at 1717, 64 L. Ed. 2d at 345. We are unable to discern from the record when the relationship between defense counsel and the assistant county attorney began. Nevertheless, defense counsel had an obligation to inform her client and the district court when the potential for a conflict arose.

cannot discern from the record the nature of the relationship between Ms. Evans and Mr. Rosenbladt, or whether it was adequately disclosed to Williams. Similarly, there is no evidence in the record tending to prove either counsel or the court disclosed the effects these relationships might have on Williams's right to have a zealous advocate exercising independent judgment. Given the insufficiency of the record, we are unable to determine whether Williams understood the significance of the possibility of conflict such that he could have knowingly waived it.

Because we are unable to determine whether an actual conflict existed or whether Williams waived objection to Ms. Hult's continued representation, we remand this case to the district court for a hearing to determine whether an actual conflict of interest existed by virtue of the relationships between Williams's counsel and an assistant county attorney and between another member of the public defender's office and the prosecutor's office. On remand, the district court should hear evidence on and decide the following questions: (1) Did the relationships among attorneys in the county attorney's office and the public defender's office result in a breach of counsel's duty to preserve Williams's confidences and secrets? (2) Did the relationships result in a breach of counsel's duty to exercise independent professional judgment on behalf of Williams? (3) Did counsel fail, because of the relationships, to represent Williams zealously? If the court finds there was an actual conflict of interest, the court should then decide whether the conflict actually affected the adequacy of his representation. Finally, if it is determined an actual conflict affected the adequacy of representation, the court should then determine whether Williams made a

knowing and voluntary waiver of conflict-free counsel by consenting to the representation on the record. If the district court finds no actual conflict affected the adequacy of the representation, or a conflict existed but was waived, defendant's conviction shall stand. If, however, the court finds an actual conflict affected the adequacy of the representation, and the conflict was not waived, it shall order a new trial.

**X. Conclusion.** We affirm as to issues raised in Division III, IV, V, VI, and VIII of this opinion. We preserve Williams's claims of ineffective assistance of counsel for a potential postconviction relief action. We remand for a hearing and decision on the conflict of interest issue consistent with this opinion. Either party may appeal from the district court's order.

**AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.**