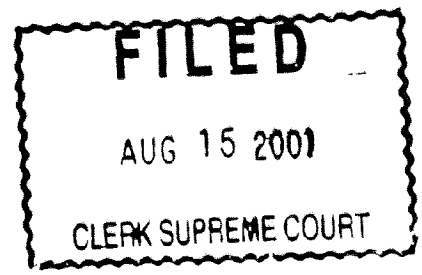
IN THE COURT OF APPEALS OF IOWA

No. 1-238 / 99-1093
Filed August 15, 2001



ROGER D. PEGRAM,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Applicant appeals from the denial of his postconviction relief application.

AFFIRMED.

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph Weeg and Melodee Hanes, Assistant County Attorneys, for appellee.

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

STREIT, P.J.

In May 1991 Roger Pegram was convicted of first-degree murder for killing his girlfriend, Maria Schuler. This court affirmed his conviction in November 1992. *See State v. Pegram*, No. 91-1121 (Iowa Ct. App. Nov. 30, 1992). We now review his appeal of the district court's denial of his application for postconviction relief. He asserts the following claims:

1) His trial counsel was ineffective because, after the State purportedly allowed its witnesses to present false testimony, he did not object or move for a new trial or a mistrial;

2) His trial counsel was ineffective because he did not object to the defective trial information;

3) His trial counsel was ineffective because he did not object to the trial court's jury instruction on voluntary manslaughter;

4) His trial counsel was ineffective because he did not raise the proper statutory and constitutional objections to Schuler's coworker's testimony regarding the bruises she had seen on Schuler after Pegram moved into Schuler's apartment;

5) His trial counsel was ineffective because he told jurors they would probably learn someone involved in the case was a martial arts expert, but he never produced evidence to substantiate this assertion; and

6) The postconviction court should have granted his application to appoint an expert to test certain physical evidence.

We affirm the district court.

I. Barred Claims.

In his original and amended applications for postconviction relief, Pegram asserted several claims we did not previously resolve on direct appeal. "[P]ostconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal." *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999); *see also* Iowa

Code § 822.8 (1997). We begin, therefore, by determining which of Pegram's claims are properly before us.

A. False Testimony.

Pegram claims his trial counsel was ineffective because, after the State purportedly allowed its witnesses to present false testimony, he did not object or move for a new trial or a mistrial. On direct appeal Pegram raised eight ineffective-assistance-of-trial-counsel claims, including that "[t]rial counsel failed to file any post-trial motions, or even discuss same with the Appellant." We did not specifically address this claim or any of Pegram's other ineffective-assistance-of-trial-counsel claims. Rather, without identifying a particular ineffective-assistance-of-trial-counsel claim, we simply stated the following: "We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding." *Pegram*, slip op. at 5. This statement did not, as Pegram asserts, "reserve a catchall claim of ineffective assistance of counsel for postconviction proceedings." It preserved only those ineffective-assistance-of-trial-counsel claims for which Pegram had "specifically identified where counsel's deficiency occurred [and] how competent representation would have changed the outcome of his trial." *See State v. Astello*, 602 N.W.2d 190, 199 (Iowa Ct. App. 1999). It did not preserve Pegram's generic ineffective-assistance-of-trial-counsel claim regarding posttrial motions.[1]

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[1] In this appeal, Pegram raises only one of the ineffective-assistance-of-trial counsel claims that was properly presented and thus preserved. We will discuss that issue—

1. "Sufficient reason" exception.

Pegram's failure to properly present on direct appeal his ineffective-assistance-of-trial-counsel claim regarding false testimony does not automatically bar him from raising it in postconviction relief proceedings. "[A]ny claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error." *Berryhill*, 603 N.W.2d at 245. "[I]neffective assistance of appellate counsel may provide sufficient reason." *Id.* Pegram did present an ineffective-assistance-of-appellate-counsel claim to the postconviction court.[2]

To prevail on such a claim, Pegram must prove by the preponderance of the evidence both his appellate counsel's deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001); *see also State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App.1994) (stating we review ineffective-assistance-of-counsel claims de novo). To prove the latter prong, Pegram must show his ineffective-assistance-of-trial-counsel claim would have prevailed if it had been raised on direct appeal. *See Ledezma*, 626 N.W.2d

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which involves trial counsel's purported comments regarding an unidentified martial arts expert—in greater detail in section II.

[2] Pegram does not argue in his current appellate briefs his counsel on direct appeal was ineffective for failing to present his ineffective-assistance-of-trial-counsel claim regarding false testimony. However, in Pegram's pro se application for postconviction relief, he asserted "[a]t the district court and appellate level, [he] was denied effective assistance of counsel." Although he did not explicitly link this assertion to any particular issues, we given him the benefit of the doubt and assume he was claiming his appellate counsel was ineffective for failing to present his various ineffective-assistance-of-trial-counsel claims on direct appeal.

at 141. Ironically, we must analyze the merits of Pegram's ineffective-assistance-of-trial-counsel claim regarding false testimony to determine whether error has been preserved. *See id.* at 141-42.

2. The merits.

Pegram argues several of the State's witnesses—including two police officers, Schuler's teenage daughter, and two of Schuler's neighbors—all lied about what occurred during and after a domestic assault incident between Pegram and Schuler roughly two months before Schuler was murdered. There are discrepancies between some of these witnesses' respective versions of what occurred. We are not convinced, however, any of these witnesses knowingly gave false testimony.

Pegram also argues the State's criminalist lied when she testified two hairs found in Schuler's hand "were *both* similar to [Schuler's] head hairs and similar to Mr. Pegram's." (Emphasis added.) This statement contradicted the criminalist's own report, which stated the two hairs were "dissimilar" to Pegram's head hairs. However, given the syntax of this disputed statement and the remainder of the criminalist's testimony, the statement appears to be indicative of either a careless misstatement or an error in transcription—not perjury.

Finally, Pegram argues a police officer lied about seeing blood on Pegram's pants while they were both at the scene of Schuler's murder. The argument this testimony was "obviously false" is just one of several arguments Pegram has woven together to reach the "inescapable conclusion" the police tampered with evidence and framed him. We are not swayed by such conjecture and speculation.

3. Conclusion.

Because there is no merit to Pegram's contention the State knowingly allowed its witnesses to present false testimony, his trial counsel was not ineffective for failing to object to the disputed testimony or for failing to move for a new trial or a mistrial. *See, e.g., State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993) ("[The defendant] is unable to prove prejudice in the present case because both issues he claims his counsel should have raised are clearly without merit."). Accordingly, Pegram's ineffective-assistance-of-appellate-counsel claim also fails. Error has not been preserved.

B. Trial Information.

Pegram claims his trial counsel was ineffective because he did not object to the defective trial information.[3] Because Pegram did not properly present this claim on direct appeal, whether he has preserved error hinges again on the interplay of his ineffective-assistance-of-trial-counsel and ineffective-assistance-of-appellate-counsel claims.

Pegram argues the trial information was statutorily and constitutionally defective. Pursuant to Iowa Rule of Criminal Procedure 4(7), a trial information must include the following:

> a. The name of the accused, if known, and if not known, designation of the accused by any name by which the accused may be identified.
>
> b. The name and if provided by law the degree of the offense, identifying by number the statutory provision or provisions alleged to have been violated.

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[3] Pegram asserts this claim and the following claim in his supplemental pro se appellate brief.

c. Where the time or place is a material ingredient of the offense a brief statement of the time or place of the offense if known.

d. Where the means by which the offense is committed are necessary to charge an offense, a brief statement of the acts or omissions by which the offense is alleged to have been committed.

See also Iowa R. Crim. P. 5(5) ("[A]ll provisions of law applying to prosecutions on indictments apply also to informations."). To be constitutionally valid, in turn, an information must inform a defendant "of the crime charged with sufficient certainty to enable him to prepare his defense and to protect against another prosecution for the same offense." *State v. Marti*, 290 N.W.2d 570, 577 (Iowa 1980). "Iowa courts consider both the . . . information and the minutes filed when determining the adequacy of the allegations to apprise the accused of the crime charged." *State v. Grice*, 515 N.W.2d 20, 23 (Iowa 1994).

The trial information was not defective. It named Pegram as the defendant, identified Schuler as the victim, charged first-degree murder as the violated offense, listed sections 707.1 and 707.2 as the pertinent sections of the Iowa Code, and noted December 18 or 19, 1990, as the date of the crime. It was accompanied by a detailed, thirty-page minutes of testimony. Pegram's trial counsel was not obligated to make a meritless objection to the trial information. Error has not been preserved.

C. Manslaughter Instruction.

Pegram claims his trial counsel was ineffective because he did not object to the trial court's jury instruction on voluntary manslaughter. As with Pegram's prior two claims, whether he has preserved error hinges on the interplay of his

ineffective-assistance-of-trial-counsel and ineffective-assistance-of-appellate-counsel claims.[4]

The trial court's voluntary manslaughter instruction stated, in pertinent part, the following:

> The State must prove all of the following elements of Voluntary Manslaughter:
>
> 1. On or about the 18th-19th day of December, 1990, the defendant intentionally struck Maria Schuler.
>
> 2. Maria Schuler died as a result of being struck.
>
> 3. The striking was done solely by reason of sudden, violent and irresistible passion resulting from serious provocation.

See I Iowa Crim. Jury Instr. 700.15 (1988). Pegram argues the final element illogically places on the State the burden of proving a mitigating fact.

Even if Pegram's argument has merit, his ineffective-assistance-of-trial-counsel claim fails. "Error in giving . . . jury instructions does not merit reversal unless it results in prejudice to the defendant." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Here, the jury was instructed on first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. It found Pegram guilty of the greatest offense, first-degree murder. Pegram thus was not prejudiced by the purportedly erroneous instruction on one of the lesser offenses. *Cf. State v. Nowlin*, 244 N.W.2d 591, 596 (Iowa 1976). ("Where both first and second-degree murder verdicts are submitted and a first-degree murder

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[4] Pegram's supplemental pro se postconviction relief brief couches the claim in terms of ineffective trial and appellate counsel. His supplemental pro se appellate brief simply asserts the instruction was erroneous. Either way, Pegram must show sufficient reason for failing to properly present the claim on direct appeal.

conviction is returned there is no prejudice for failure to instruct on manslaughter."). He thus also cannot prove the requisite prejudice to prevail on his ineffective-assistance-of-trial-counsel claim. Error has not been preserved.

D. Coworker's Testimony.

Pegram claims his trial counsel was ineffective because he did not raise the proper statutory and constitutional objections to Schuler's coworker's testimony regarding the bruises she had seen on Schuler after Pegram moved into Schuler's apartment. On direct appeal, we held there was clear proof Pegram had inflicted these bruises and thus the testimony was not barred by Iowa Rule of Evidence 404(b).[5] *See Pegram*, slip op. at 3-4. Pegram now asserts his trial counsel should have objected to the testimony pursuant to rule 403[6] and "in terms of a violation of the fundamental fairness guaranteed by the federal constitution."

Section 822.8 states "[a]ny ground finally adjudicated . . . may not be the basis for a subsequent [postconviction] application." Pegram, despite his protestations to the contrary, is reasserting a claim we decided in the State's favor on direct appeal. For example, in his final brief he argues: "The jury was led to the conclusions of character and propensity that are supposed to be

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[5] Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[6] Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

avoided. As a result, Mr. Pegram's fundamental federal constitutional rights to due process and a fair trial . . . were violated." Similarly, in his reply brief he argues:

> The due process violation is in allowing clearly inadmissible testimony to have such a drastic impact. . . . Where irrelevant evidence is admitted that has no practical effect other than to paint the Defendant as a bad man, and it thereby prejudices the jury against him, then the evidence deprives the Defendant of a fair trial. When the Defendant is deprived of a fair trial, he is deprived of due process.

We will not revisit Pegram's claim regarding the inadmissibility of the coworker's testimony. This claim, like the three previous claims, is barred. We now turn to Pegram's claims that are properly before us.

II. Martial Arts Expert.

Pegram claims his trial counsel was ineffective because he told jurors they would probably learn someone involved in the case was a martial arts expert, but he never produced evidence to substantiate this assertion. Pegram argues the jury, after learning Schuler may have been beaten to death by someone who was using only his hands and feet, would have "naturally concluded" Pegram was the unidentified martial arts expert.[7]

Pegram relies heavily on *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), a federal case in which a criminal defendant's trial attorney created a prejudicial "speaking silence." In that first-degree-murder case, trial counsel told jurors he would "call a psychiatrist and a psychologist, 'whose testimony would show that defendant was walking unconsciously toward a psychological no exit. . . . Without

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[7] Schuler, not Pegram, was the individual who apparently had some martial-arts experience.

feeling, without any appreciation of what was happening, [defendant] on that night was like a robot programmed on destruction.'" *Anderson*, 858 F.2d at 17. However, he called only lay witnesses. *Id.* The court noted:

> The promise was dramatic, and the indicated testimony strikingly significant. The first thing that the ultimately disappointed jurors would believe, in the absence of some other explanation, would be that the doctors were unwilling, viz., unable, to live up to their billing. This they would not forget.

Id. The court further noted the opening promise "went to the vitals of defendant's defense, and no juror, obviously offended by defendant's conduct, would ignore it." *Id.* at 18. The court thus found trial counsel ineffective. *Id.*

In contrast, Pegram has not proven he was prejudiced by his trial counsel's purported deficient performance. If his trial counsel did tell jurors—whether in *voir dire* or his opening statement—someone involved in the case was a martial arts expert, this assertion likely would have had little immediate significance to them.[8] Moreover, his trial counsel's failure to substantiate the assertion would have done little to undermine his primary defense—namely, that two other men beat Schuler to death in her apartment while he was elsewhere. Pegram cannot prevail on his ineffective-assistance-of-trial-counsel claim. We affirm the postconviction court.

III. Appointment of an Expert.

Finally, Pegram claims the postconviction court should have granted his application to appoint an expert to test the bloodstains on his clothes, the cigarette butts found in Schuler's apartment, and the blood found near Schuler's

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[8] Pegram's trial counsel did not recall making such a statement.

anus. He further claims such testing "was necessary to demonstrate ineffective assistance of counsel by disclosing exculpatory evidence." We review the postconviction court's denial of Pegram's application for an abuse of discretion. *See State v. Leutfaimy*, 585 N.W.2d 200, 207 (Iowa 1998). To the extent Pegram claims he was denied effective assistance of counsel, our review is de novo. *See id.*

Pegram "bears the burden to demonstrate a reasonable need for the appointment of an expert." *Id.* at 208. "An indigent criminal defendant is not entitled to appointment of expert services at state expense unless there is a finding that the services are necessary in the interest of justice." *Id.* "When the accused is merely embarking on a 'random fishing expedition' in search of a defense courts are discouraged from allowing State funds for experts." *Id.* (citation omitted).

The postconviction court did not abuse its discretion in ruling the requested expert was unnecessary. Pegram argues additional tests of the bloodstains on his clothes would reveal whether the blood had preservatives in it—and thus whether it had been drawn from Schuler's body and planted on his clothes. As we discussed previously, Pegram's contention police tampered with evidence is merely conjecture and speculation. Pegram also argues tests of the seven cigarette butts found in Schuler's apartment could corroborate his theory two other men killed Schuler. At best, however, such tests would reveal an unknown person had smoked one or more of the cigarettes at an unknown time. Finally, Pegram argues tests of the blood found near Schuler's anus could show

it was an unknown person's blood and thus further bolster his defense.[9] The medical examiner testified as follows: "The only conclusions are that the source of the bleeding is potentially from [Schuler's] mouth which may have gone down to this [rectal] area and was not wiped clean or something." Given this plausible explanation regarding why there was blood near Schuler's anus and the other incriminating evidence against Pegram, the postconviction court did not abuse its discretion in ruling the "expense of an expert is not justified." We affirm the postconviction court.

IV. Conclusion.

Pegram's first four claims are barred. *See Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991) ("[W]e will affirm on appeal, as we do here, where any proper basis appears for the district court's ruling, even though it is not the one upon which the court based its ruling."). His remaining two claims are without merit. We affirm the district court's denial of his application for postconviction relief.

AFFIRMED.

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[9] Police found Schuler lying on a makeshift bed in her living room. She was naked, but apparently had not been sexually assaulted.

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