

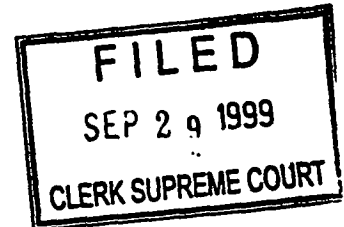
IN THE COURT OF APPEALS OF IOWA

No. 1999-247 (9-477) / 98-1108
Filed September 29, 1999

STEVEN SAGER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Sager's conviction for first degree murder was upheld on post conviction review. On appeal, he claims that he was denied the effective assistance of counsel through his trial counsel's failure to (1) object to prejudicial testimony; (2) present self defense and insanity defenses; (3) get a prompt psychiatric evaluation; (4) object to the admission of evidence; (5) elaborate, to the jury, upon the conditions for second-degree murder; (6) request a change of venue; and (7) object to a biased juror. He claims the cumulative effect of these errors denied him the effective assistance of counsel. Lastly, he contends the court erred by refusing to appoint substitute post conviction counsel. **AFFIRMED.**

Jason P. Happel of Singer, Pasley, Holm, Timmons, Mathison & Curtis L.L.P.,
Ames, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Mary E. Richards, County Attorney, and Daniel Gonnerman, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Applicant-Appellant Steven Sager was convicted of first degree murder after he admittedly stabbed his wife twenty-six times. His conviction was affirmed by the Supreme Court in an unpublished opinion. *State v. Sager*, 520 N.W.2d 631 (1994). The Supreme Court did not address Sager's claims his trial counsel was not effective but reserved these claims. Sager then sought relief by way of this post conviction proceeding. The district court denied his claims and this appeal follows. Sager contends on appeal that his trial attorney made a number of mistakes and he was prejudiced. We affirm.

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). A defendant 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 a defendant must prove there is a reasonable probability that 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.* In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for post conviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v.*

McKettrick, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

While Carol and Sager were living together some one or two weeks before her murder Sager told a nephew "if you ever stab anything, stab it until it is dead". The nephew testified at trial Sager made this statement. Sager's trial counsel did not object. Sager contends this statement, which he denied making, was highly prejudicial. He advances it allowed the jury infer the elements necessary for a first degree murder conviction.

The state concedes because of the time the remark was made and because it was made with no reference to Carole an objection might have been sustained. The state advances, however, that the testimony was harmless. The state argues evidence introduced showing (1) Sager's statement to three other witnesses he was going to kill Carole, or buy a gun and get her, or he ought to kill her; (2) Sager's attempt to trade a truck for a hand gun, (3) Sager attacking Carole with both a hatchet and knife; and, (4) the number and location of Carole's wounds, provides overwhelming evidence Sager killed her with malice aforethought, deliberately, premeditatedly and with the specific intent to kill. The state advances also the statement of the nephew was cumulative evidence and its exclusion would not have weakened the state's case.

Sager has failed to show that had the evidence been excluded the outcome of the trial probably would have been different. We affirm on this issue.

Sager next contends his trial counsel failed to prepare and argue a proper

insanity defense. Sager advances that his trial counsel should have shown he was unable to form the specific intent to kill at the time the crime was committed. Sager contends his behavior at the time is a factor used in making this determination. Sager further contends his trial counsel had a duty to secure a timely psychiatric evaluation and also raise an insanity defense. He argues information about his state of mind at the time of the crime was lost by counsel's delay in arranging an examination.

Sager's trial counsel testified she discussed an insanity defense with him and they both agreed it did not fit. The post conviction court found the psychiatric evaluation only became an issue after Sager decided to plead guilty to First Degree Murder and his trial attorney questioning the rationale of that decision to convince Sager to have a psychiatric evaluation to decide whether Sager was able to plead guilty. The post conviction further found this decision was a judgment call Sager's trial counsel made with Sager's input after counsel had examined prior mental health records and evaluated the facts surrounding the incident. We find no valid reason to disagree with these findings of the district court. We affirm on this issue.

Sager next contends his trial counsel should have advanced a claim of self defense. He contends this issue was not adequately reviewed. Sager argues he was hit with an ax and his glasses were broken. The state points out there were no injuries on Sager's body. Sager's trial counsel testified she would have advanced a claim of self-defense if Sager had requested it. However, she said she told him it was not appropriate when one considered the severity of his attack on Carole. She said it was

Sager's decision not to claim self-defense.

The state contends that had Sager claimed self-defense there is no reasonable probability the jury would have accepted it. We agree. Sager began the attack with a hatchet and knife. He had the weapons throughout the incident. Carole had twenty-six stab wounds; Sager had none. Sager has not shown the required prejudice to succeed on this claim.

Sager next contends his trial counsel should have cross-examined the doctor who treated him following the event. He contends questions should have been asked of this person to clarify Sager's condition at the time he gave a taped statement. Sager contended he took twenty Valium tablets between the murder and his giving the statement.

The evidence was Sager had a minimum amount of Valium in his body when the statement was given. Sager has failed to show any grounds on which the statements would have been suppressed. An attorney has no duty to make a motion which will not be sustained. *See State v. Claser*, 484 N.W.2d 192, 195 (Iowa 1998).

Sager next contends his trial counsel should have requested a change of venue because of pretrial publicity and the fact the stabbing happened in a small town. While claiming there was a good deal of news coverage Sager has shown nothing else. To receive a change of venue Sager has to show there was such prejudice in the county where the trial was to be held that there was a substantial likelihood a fair and impartial trial could not happen if the jury was selected from that county. *See Iowa*

R.Cr.P. 10(10(b)). To prevail on such a claim, Sager must prove the publicity attending the case was so pervasive and inflammatory that prejudice must be presumed or that actual prejudice occurred. *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989). Sager cannot show that had the motion of change of venue been made there was a probability it would have been sustained. *See Ceaser*, 585 N.W.2d 195. Nor is there a showing that had the motion been granted there was a probability he would not have been convicted of first degree murder by a jury from another county.

Sager next contends that his trial counsel should have inquired as to bias of a potential juror who was a sister of Carole's neighbor. Sager claimed he called this relationship to his trial attorney's attention but he had no knowledge the juror would be prejudiced. The question is whether there was evidence the juror held such a fixed opinion of the merits of the case that she could not judge impartially the guilt or innocence of Sager. *See Johnson*, 318 N.W.2d at 421-22; Iowa R.Crim.P. 17(5)(k) (providing for a challenge for cause where a juror has expressed an opinion which would prevent the juror from rendering a true verdict on the trial evidence). *See also State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990). The record Sager made in the post conviction court does not support a finding the juror had an opinion such as would have prevented her from rendering a true verdict on the evidence.

Sager next contends the errors of trial counsel when considered together are ineffectiveness assistance of counsel. We disagree.

Sager further contends the district court should have allowed counsel on post

conviction to withdraw. Sager and his post conviction counsel had problems. He wrote her telling her she was fired. She asked to withdraw. Sager argues the district court's refusal to dismiss her and appoint substitute counsel prejudiced him and he was not able to convince her to raise strategies he believed would inure to his advantage.

Sager, while claiming he was prejudiced by the court's ruling, has failed to show what his post conviction could have done but did not do.

We have considered Sager's other arguments and find no basis to reverse the post conviction court.

AFFIRMED.