IN THE COURT OF APPEALS OF IOWA

No. 3-239 / 92-0857

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**TROY SHEARON,**

Appellant,

**vs.**

**STATE OF IOWA,**

Appellee.

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Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Troy Shearon appeals the district court's decision denying his application for postconviction relief. **AFFIRMED.**

Francis C. Hoyt, Jr., West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

**SCHLEGEL, J.**

Tony Shearon was convicted of first-degree murder and first-degree robbery. His convictions were affirmed by this court on October 5, 1989. State v. Shearon, 449 N.W.2d 86 (Iowa App. 1989). Shearon unsuccessfully sought postconviction relief and now appeals the district court ruling.

The basis of the petitioner's claim for relief is ineffective assistance of trial and appellate counsel. He claims that as a result of his denial of effective assistance of trial and appellate counsel, he was denied a fair trial.

Postconviction relief actions under Iowa Code chapter 663A are law actions triable to the court. Review of such actions is ordinarily on error. When an alleged denial of constitutional rights is asserted, however, the appellate court reviews the totality of the circumstances. This is tantamount to a de novo review. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981).

The applicant first asserts a claim of ineffective assistance of trial counsel. He claims counsel failed to object to testimony by the state medical examiner when he gave an opinion that certain wounds suffered by the victim were defensive-type wounds. He also complains trial counsel did not move for a mistrial when the prosecutor made prejudicial statements concerning evidence supposedly given by a witness.

Shearon also claims his appellate counsel was ineffective in four respects; Shearon claims: (1) appellate counsel neglected to raise the issue of the trial court's failure to declare a mistrial after witness Scott Szczepanik testified that Shearon intended to kill the victim; (2) appellate counsel failed to challenge the sufficiency of evidence supporting Shearon's conviction; (3) appellate counsel failed to challenge the jury instructions given at Shearon's trial; and (4) appellate counsel failed to challenge the prosecutor's conduct in uttering what Shearon refers to as prejudicial statements not supported by evidence. As indicated, these issues were not raised as issues on appeal.

The State claims these issues were waived since they were not properly raised on appeal. However, as the State recognizes, failure to raise issues on direct appeal may not result in waiver, if: (1) sufficient reason or cause exists for not having raised them on direct appeal; and (2) actual prejudice resulted from the claimed error. Polly v. State, 436 N.W.2d 624, 627 (Iowa 1989). Ineffective assistance of appellate counsel through failure to raise issues may constitute sufficient reason or cause for not having raised the issues. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

A claim of ineffective assistance of appellate counsel must satisfy a standard analogous to that involved in claims of ineffective assistance of trial counsel. Id. at 627. That standard requires the applicant to show:

(1) counsel's performance was so deficient as not to be functioning as "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Id.; see also State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). We hold the trial court correctly denied postconviction relief, and we affirm.

Shearon's first claim is that his trial counsel failed to render effective representation by failing to object to the testimony of the medical examiner, who testified the wounds on the victim's hands indicated defensive reaction by the victim, not aggressive action. The foundation laid for the opinion testimony of the medical examiner was adequate to permit his testimony on that subject. The trial court had the discretion to admit that testimony since substantial foundation had been laid by Dr. Bennett to render the opinion.

The defendant has failed to illustrate how the testimony of which he complains would have been excluded if trial counsel had objected to the testimony. "We are generally committed to a liberal rule which allows opinion testimony if it will aid the jury in screening the properly admitted evidence to ascertain the truth." State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986) (citing State v. Hall, 297 N.W.2d 80, 84 (Iowa 1980)). In the discretion of the trial court, the allowance of such opinion testimony in the present case would not have constituted error.

Shearon's second claim of ineffective trial counsel relates to the failure of trial counsel to move for a mistrial due to prejudicial statements made by the prosecutor concerning evidence given by Tamara Seitzer. Shearon claims the prosecutor's statement was not supported by evidence previously introduced at trial. An examination of the record, in our de novo review, demonstrates the departure from the testimony given by Seitzer was very slight. The sense of the question asked by the prosecutor was very near to the answers given by the witness. In any event, the court properly left the determination of the correct answer to the jury. Counsel made an appropriate objection, but no grounds existed in the prosecutor's statement (a leading question) upon which to grant a mistrial.

Next, the applicant claims appellate counsel was ineffective in four specific respects. First, he claims appellate counsel should have appealed the trial court's failure to declare a mistrial due to a statement made by witness Scott Szczepanik after the witness had been admonished to refrain from testifying about the statement. The court refused to grant a mistrial. We believe the court handled the matter correctly, within its discretion, and we conclude appellate counsel was not ineffective for failing to raise this issue on direct appeal. Other testimony existed in the record relating to the same subject, so that the statement by this witness was largely cumulative.

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Shearon's second claim of ineffective appellate counsel is that counsel did not challenge the sufficiency of evidence supporting the conviction. We formerly found the evidence in support of the convictions to be overwhelming. See State v. Shearon, 449 N.W.2d 86 (Iowa App. 1989). Counsel was clearly not ineffective for failing to attack the convictions on this basis.

The third claim of ineffective appellate counsel involves counsel's alleged failure to challenge the jury instructions given at trial. Shearon contends the following actions by the trial court were improper and should have been raised: (1) giving an instruction on aiding and abetting; (2) instructing the jury on the felony-murder theory of first-degree murder; and (3) refusing to give a proposed special interrogatory on the mode or theory of first-degree murder decided by the jury, in the event of a guilty verdict. We have examined the record on the issue of the jury instructions given and find no error on the part of the trial court. A general charge of first-degree murder is sufficient to allow the court to submit either or both felony-murder or premeditated murder to the jury. State v. Kyle, 322 N.W.2d 299, 307 (Iowa 1982). On the question of the special interrogatory, our supreme court has said:

> [I]f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required.

State v. Duncan, 312 N.W.2d 519, 523 (Iowa 1981). We find no ineffective assistance of appellate counsel in the failure to appeal the issues with respect to the jury instructions. No error by the trial court occurred.

The fourth and final claim of ineffective assistance of appellate counsel relates to the statement made by the prosecutor during the cross-examination of the defendant during the criminal trial. No reference is made to the appendix or the transcript where this issue appears. We assume that it refers to the same issue previously addressed in this opinion. As previously discussed above, we have found this statement to be nonprejudicial to defendant, in view of the overwhelming nature of the evidence to the same effect, and in view of the fact that the deviation from the testimony referred to was minimal.

In accordance with the above discussion, we conclude the petitioner has failed to carry his burden to show, by a preponderance of the evidence, that his trial or appellate attorneys breached an essential duty and that prejudice resulted. Accordingly, we affirm the trial court.

**AFFIRMED.**