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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-506 / 95-1009

HARVEY W. SPENCER, JR.,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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

Harvey Spencer appeals the district court's denial of his application for post conviction relief. **AFFIRMED.**

Harvey W. Spencer, Jr., Fort Madison, pro se, appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

STREIT, J.

Defendant appeals the district court's denial of his application for postconviction relief alleging ineffective assistance of counsel during trial.

In 1989, Harvey Spencer, Jr. was convicted on two counts of first-degree murder. His convictions were affirmed on appeal and claims of ineffective assistance of counsel were preserved for postconviction proceedings.

In May, 1994, Spencer filed an application for postconviction relief alleging trial counsel had been ineffective in: (1)failing to move for a change of venue; (2) failing to object to jury instruction number 18; and (3) failing to have opening and closing arguments recorded. Following a hearing the district court denied the application.

In response to the denial, Spencer filed a timely Iowa Rule of Civil Procedure 179(b) motion alleging additional reasons counsel was ineffective. These included: (1) failing to preserve record on the issue of an allegedly unlawful search of Spencer's house; (2) failing to preserve record on an allegedly unlawful search and impoundment of his car; (3) failing to preserve record on alleged Miranda violations; (4) failing to object to the State's improper comments during closing arguments; (5) failing to challenge the selection of the jury pool; and (6) failing to strike a juror after learning the juror knew the victim's son-in-law. The court rejected these claims.

Spencer appeals. He argues the court erred in finding his counsel was not ineffective for failing to assist at trial given the allegations presented in postconviction

proceedings. Spencer further argues the court erred in ruling counsel provided effective assistance when counsel's combined failures of inadequate representation resulted in cumulative prejudice. We affirm the district court's denial of postconviction relief.

SCOPE OF REVIEW

Ordinarily, our review of postconviction relief proceedings is for errors of law *Hinkle v. State*, 290 N W 2d 28, 30 (Iowa 1980). When, however, a postconviction petitioner asserts violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

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. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). To demonstrate prejudice, Spencer must prove there is a reasonable probability, 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.*

A court need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *State v. Nebinger*, 412 N.W.2d 180, 192 (Iowa App. 1987).

> [T]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the

> ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. (quoting *Strickland v. Washington,* 466 U S. 668, 697, 104 S. Ct. 2052, 2070, 80 L. Ed. 2d 674, 700 (1984)).

Established principles govern our review of the defendant's sixth amendment claim that the trial counsel was ineffective. *Blair v. State*, 492 N.W 2d 220, 222 (Iowa App. 1992). Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069 , 80 L. Ed.2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* At 686, 104 S. Ct. At 2064, 80 L. Ed.2d at 692-93; *see Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance." *Strickland*, 466 U.S. at 688, 104 S. Ct. At 2056, 80 L. Ed.2d at 694.

I. *Change of Venue*

Spencer contends trial counsel was ineffective for failing to move for change of venue. His argument centers on the pretrial publicity surrounding the case and that because of the coverage, he could not receive a fair trial in Polk County. Asking for change of venue is a matter of professional judgment about which experienced trial

lawyers frequently disagree. *Karasek v. State*, 310 N W 2d 190, 191 (Iowa 1981). It does not reflect on competency nor indicate ineffectiveness. *Id.* In this case, *voir dire* examination of the prospective jurors was done by interviewing each juror singly, so as not to taint the rest of the jury panel if they knew about any pretrial publicity. There was no evidence that the jury selected was affected by any pretrial publicity. Moreover, we have held that defense counsel's failure to seek a change of venue does not reflect on competency, nor is it indicative of ineffectiveness. *Fryer v. State*, 325 N W.2d 400 (Iowa 1982); *Karasek*, 310 N.W.2d at 191. We find the trial counsel's decision not to motion for change of venue proper in the light of the fair and impartial jury impaneled.

II. Jury Instructions

Spencer contends he received ineffective assistance of counsel when his attorney did not object to a premeditated murder jury instruction which included the words "may be concluded" instead of "infer"as it is used in the Iowa Uniform Jury Instructions 700.9. The instruction stated:

> Malice aforethought, deliberation, premeditation and a specific intent to kill may be concluded from the use of a dangerous weapon accompanied by an opportunity to deliberate.

We find counsel was not ineffective in allegedly failing to adequately object to the inclusion of the premeditated murder instruction. We find this instruction to be an accurate representation of the law as applied to the facts. Spencer has not proven he was prejudiced by his counsel's decision to agree to the instruction.

III. Failure To Preserve the Record

Spencer contends his trial counsel was ineffective for failing to have opening and closing arguments recorded, thus preserving the record by objecting to the State's allegedly improper comments during opening and closing arguments. Defense counsel is not required to have closing arguments recorded. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982) If they are not recorded, a proper objection at trial will preserve the error. *Id.*, *see State v. Phillips*, 226 N.W 2d 16, 18 (Iowa 1975). Counsel testified at the postconviction hearing (PCR) that he did not have the opening and closing arguments recorded because he trusted the prosecutor to not make improper comments. If any improper statements were made, he would object to them at the time and the judge would hear the arguments of the objections on record in chambers and rule on them.

Spencer argues his trial counsel should have objected to the following: (1) In opening statements , the prosecutor allegedly stated that Spencer had seven months to make up a story. Spencer's counsel stated at the PCR he chose not to object because he anticipated that Spencer would testify and that Spencer was not harmed by the statement; (2) In closing argument, the prosecutor held up a shotgun that had been found in Spencer's car after the shootings. The shotgun had been admitted into evidence. Spencer's counsel testified at the PCR that he believed the prosecutor had picked up the MAC 11, the murder weapon and did not object; and (3) In closing argument, the prosecutor called Spencer a "cold-blooded killer." Counsel

testified at the PCR this was not opinion testimony, but it was stated in the context of what the evidence indicated and so he did not object

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer*, 325 N.W 2d at 413 Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *See Hinkle*, 290 N W 2d at 34 In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131 Failure to object is not sufficient grounds for granting postconviction relief. The record in the case at bar reflects that trial counsel's actions were justifiable. Trial counsel was not ineffective for such trial strategy.

IV. Pretrial Preparation

Spencer contends his trial counsel should have filed a motion to suppress the evidence from of an allegedly unlawful search of his home and his car, impoundment of his car, and statements he made to the police after his arrest. Spencer further urges counsel failed to challenge the admissibility of the evidence at trial.

An attorney is not ineffective for failing to seek the suppression of admissible evidence. *Love v. State*, 543 N W 2d 621, 623 (Iowa App. 1995); *Kellogg v. State*, 288 N.W.2d 561, 565 (Iowa 1980). No prejudice was visited upon Spencer due to the failure of his attorney to file a suppression motion. Counsel did not act outside the normal range of competency in deciding not to move to suppress the evidence because he felt it aided Spencer's delusional syndrome defense.

Only in rare cases may the failure to preserve error deny a defendant effective assistance of counsel. *State v. Rice*, 543 N.W.2d 884 (Iowa 1996). Spencer's counsel did not object to the evidence at trial because the evidence supported Spencer's defense. We are unable to conclude this decision was ineffective assistance of counsel.

V. Selection of Jury Pool

Defendant did not object to the composition of the jury pool at any time prior to the finding of his guilt for two counts of first-degree murder, nor did he raise the issue during direct appeal. A defendant's failure to object to the jury panel in accord with rule 17(3) (statutory challenges to the jury panel must be made before being sworn) waives consideration on appeal of the issues whether the method of selecting jurors violated the requirements of Iowa Code section 60A.22. *State v. Johnson*, 476 N.W.2d 330 (Iowa 1991). While a means of establishing sufficient reason for previous failure to raise an issue is to show all previous counsel were ineffective, Spencer has not satisfied this requirement. Therefore, this issue is not considered on appeal.

VI. Striking a Juror

Spencer claims counsel was ineffective for failing to strike a juror after learning the juror knew the victim's son-in-law. The record in this case supports a finding that Spencer and his attorney generally discussed the issue of striking this juror. Counsel determined that he did not want the alternate on they jury and Spencer acquiesced in the strategy pursued by his attorney. This was a tactical decision which was reasonable.

CONCLUSION

Finally, Spencer contends the cumulative effect of all his contentions alleged previously require this court to grant him a new trial. We, however, find Spencer has failed to satisfy the prejudice component of his ineffectiveness assistance of counsel claim. There is overwhelming evidence of Spencer's guilt. Trial counsel was not ineffective, as his decisions were part of a justifiable and deliberate defense strategy. As such, we do not find any "cumulative effect" of error caused by the district court. Spencer received a fair trial by a fair tribunal, and, therefore, we affirm his convictions.

AFFIRMED.