

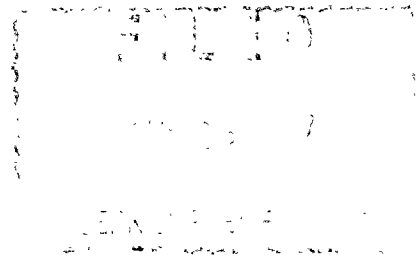
IN THE COURT OF APPEALS OF IOWA

No. 7-004 / 95-1546

STEVEN FRASIER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Woodbury County, Robert C. Clem,
Judge.

On appeal from the denial of his application for postconviction relief.

AFFIRMED.

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Richard J. Bennett and Charles N.
Thoman, Assistant Attorneys General, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ. Huitink, J., takes no part.

STREIT, J.

On appeal from the denial of his application for postconviction relief, the applicant argues: (1) his trial counsel was ineffective in failing to develop and present evidence that the victim had previously broken down doors to his apartments, thus undermining the jury's finding of burglary to support a verdict of felony murder; (2) his trial counsel was ineffective in failing to request a voir dire of the jurors once it was discovered a juror had been reading a newspaper in the jury room and his appellate counsel was ineffective in failing to raise this issue on direct appeal; and (3) his postconviction relief counsel was ineffective for not developing the record regarding the applicant's concern that the State had intentionally excluded minorities from the jury venire.

Applicant, Steven Frasier, was convicted of first-degree murder and first-degree burglary. The murder conviction was based on felony murder with the underlying felony being first-degree burglary (unlawful entry of the apartment where the victim lived). His convictions were affirmed on appeal. *State v. Frasier*, No. 87-504 (Iowa App. Jan. 26, 1989).

Frasier filed an application for postconviction relief which was denied.

In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.* 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)).

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). 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.

I. Failure to present evidence to negate the underlying felony. Frasier argues his trial counsel was ineffective in not developing and presenting evidence which would indicate the victim had previously broken down the doors at other apartments where he had lived. Frasier theorizes such evidence renders it probable the jury would have concluded the victim had broken into his own apartment and would not have found Frasier guilty of burglary, the underlying felony of the jury's finding of felony murder.

Applicant asserts his claim was preserved because it was raised in his application for postconviction relief and because applicant presented evidence at the postconviction hearing regarding the claim. "Postconviction proceedings are inappropriate for presentation of issues not properly raised at trial or on direct appeal,

and may not be litigated unless there is sufficient reason for not properly raising it previously.” *Gordon v. State*, 480 N.W.2d 265, 267 (Iowa App. 1991) (citations omitted). Ineffectiveness of appellate counsel can constitute a sufficient reason for not raising an issue prior to postconviction action. *See Frank v. State*, 376 N.W.2d 637, 640 (Iowa App. 1985).

The applicant testified at the postconviction hearing he did not know what felony murder meant at first, and when he found out it meant the burglary charge must be proven in order to prove first-degree murder, he felt his trial attorney was not doing anything to disprove the burglary charge. Applicant argues he specifically informed counsel the location of residences where victim had, in the past, broken down his own doors.

Counsel investigated the victim’s present residence and talked with the landlord about any previous damage to the apartment while the victim lived at that location, but there was none. Frasier testified at trial he acted in self-defense. He claimed he went to the apartment peaceably and the victim attacked him. The evidence the victim had previously broken down doors of his residences could have gone to show the victim was a violent person.

Evidence the victim was violent would still not have negated the elements of first-degree burglary. *See Iowa Code* § 713.3 (1997). The jury’s findings of first-degree burglary need not have rested on evidence of forcible breaking into the

victim's apartment. *See* Iowa Code § 713.1 (1997). Furthermore, the state could have relied on willful injury for the underlying felony. Since this defense would not have been successful at trial, counsel is not ineffective for failure to raise the defense. *Hughes v. State*, 479 N.W.2d 616, 618 (Iowa App. 1991).

II. Failure to voir dire jurors concerning their knowledge of the newspaper article. The Sioux City Journal published an article about Frasier's trial on February 5. Frasier argues his trial counsel was ineffective in not requesting to voir dire the jury once it was discovered a member of the jury panel may have been reading the newspaper. He claims his appellate counsel was ineffective in not raising this issue on direct appeal.

One of Frasier's co-defendants also filed a postconviction action in which he claimed his trial counsel was ineffective for failing to request a voir dire of the jury once it was discovered a juror had been reading a newspaper. The application was denied and affirmed on appeal. *State v. Tunstall*, No. 94-1354 (Iowa App. June 27, 1996).

As stated in *Tunstall*, we will not grant postconviction relief based on mere speculation of prejudice where no juror affidavits or testimony indicating jurors have been exposed to allegedly prejudicial media reports. *See Foster v. State*, 378 N.W.2d 713, 720 (Iowa App. 1985). Frasier has failed to prove any prejudice and demonstrate a reasonable probability sufficient to undermine confidence in the outcome of the

trial. The burden is on the defendant to demonstrate jury exposure to trial publicity. *State v. Aldape*, 307 N.W.2d 32, 45 (Iowa 1981). It has not been shown the juror reading the newspaper was a juror assigned to Frasier's case. Furthermore, it was not evident whether the newspaper was that day's paper which carried an extensive front and back page article regarding the trial.

Applicant's claim of ineffective assistance due to the failure to voir dire must fail. Beyond the fact there is no evidence to establish any juror actually read the February 5 Sioux City Journal and was prejudiced by the article about Frasier's trial, we find it sufficient strategy for counsel not to voir dire the jurors. Voir dire may have brought the jury's attention to the article and raised their curiosity as to what the story disclosed. The presumption is jurors will comply with admonishments not to expose themselves to publicity about the trial in which they are sitting as jurors. *Id.* We will not presume prejudice from the mere publication of a newspaper article, *see State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980), or the mere possibility a juror read the article.

III. Jury Venire. Finally, Frasier argues his postconviction counsel was ineffective in not developing the record concerning his claim the State intentionally excluded minorities from the jury venire. The State argues this claim has not been

preserved because Frasier did not make any complaint at the time of the PCR hearing, nor any other time before appeal that his postconviction counsel was ineffective.¹

Defendant argues his postconviction counsel was ineffective for failure to present any statistical evidence why trial counsel was ineffective for failing to challenge the composition of the jury panel.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant . . . ordinarily must show that his claim was preserved for review by being made on direct appeal. However, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence ‘sufficient reason’ or ‘cause’ for not having raised the issue on direct appeal. Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief.

LeGrand v. State, 540 N.W.2d 667, 668 (Iowa App. 1995).

Appellate counsel did not raise the issue of jury venire on direct appeal. Defendant did not allege in postconviction proceedings appellate counsel was ineffective for failure to raise on direct appeal violation of the sixth amendment’s fair cross-section requirement. Since appellate counsel did not raise the issue on direct appeal and defendant does not argue ineffective assistance of appellate counsel on this

¹ Applicant was asked during his testimony at postconviction hearing whether he was satisfied with his attorney. He indicated it was “yet to be seen” depending on the outcome. Applicant had three previous postconviction attorneys, all of which applicant was not satisfied with his representation. He also had different trial and appellate counsel.

issue, we find the issue was not preserved. Frasier has not made a showing of sufficient reason or cause for his failure to raise his claim of ineffective assistance of trial counsel in his direct appeal on this issue. His brief merely claims he adequately preserved the issue for review by his Memorandum in Support of Application for Postconviction. Postconviction counsel was not ineffective for failure to present evidence to support the argument.

AFFIRMED.