FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **GEORGE EDWARD WINDSOR,** | ) | |
| Petitioner-Appellant, | ) | Filed June 24, 1987 |
| vs. | ) | 309 |
| **STATE OF IOWA,** | ) | 7-107 |
| Respondent-Appellee. | ) | 86-244 |

Appeal from the Iowa District Court for Woodbury County (No. CR 40052-90306), Edwin L. Mitchell, Judge.

The petitioner appeals from the district court's denial of his application for postconviction relief, contending that the district court erred in ruling that an ex parte communication between a juror and a bailiff did not result in prejudice and in refusing to grant a new trial based upon newly-discovered evidence. **AFFIRMED.**

Duane E. Hoffmeyer of Vakulskas Law Firm, P.C., Sioux City, for petitioner-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and David L. Gill, Assistant Woodbury County Attorney, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

**PER CURIAM**

On January 23, 1980, the appellant, George Edward Windsor, was charged by trial information with sexual abuse in the third degree. See Iowa Code §§ 709.1, 709.4 (1979). He was subsequently tried, convicted, and sentenced to an indeterminate term not to exceed ten years. On direct appeal, his conviction was affirmed by the Iowa Supreme Court. State v. Windsor, 316 N.W.2d 684 (Iowa 1982). On December 22, 1983, Windsor filed an application for postconviction relief. On June 18, 1985, Windsor amended the application for postconviction relief and added a claim for new trial based upon newly-discovered evidence. A hearing on the application was held on November 27, 1985. The district court denied Windsor's application, and Windsor brings this appeal in order to challenge that denial.

I.

Windsor maintains the district court erred in denying his motion for postconviction relief. Windsor's first claim for relief is grounded in what he characterizes as a violation of his constitutional and statutory rights to be present at all stages of trial. At the postconviction hearing, Windsor submitted the deposition testimony of Wayne Burton, a member of the jury for Windsor's trial. Burton's deposition states the following rendition of events: During voir dire Burton had denied knowing the victim, Carol Glasson. When the State presented Glasson as its first witness, however, Burton recognized her as an acquaintance. During the first recess subsequent to Glasson being called as a witness, Burton informed the bailiff that he, Burton, had met Glasson and was casually acquainted with her. The bailiff, with whom Burton also was acquainted, told Burton that he would speak to the judge and the respective counsel and inform Burton of their decision. Following the recess, the bailiff informed Burton that he was to remain on the jury panel.

The bailiff, William Murphy, testified at the postconviction hearing that he recalls neither being contacted by Burton during Windsor's trial nor relaying any pertinent information to the judge. The judge, The Honorable James P. Kelly, testified that he did not remember being contacted by Murphy relative to Burton's situation. Neither the prosecution nor the defense counsel recalls being apprised of Burton's knowledge of Glasson. Following Windsor's trial, Burton did not mention the alleged communication again until August 1985 when he detailed the situation in a letter to Windsor's postconviction counsel.

The postconviction court found that the communication between Burton and Murphy had taken place but that no prejudice to Windsor was demonstrated by the record. Windsor claims the district court incorrectly characterized this case as one of juror misconduct and, consequently, erred in requiring a showing of prejudice. Correctly understood, according to Windsor, this case deals with the denial of his rights to be present at all stages of trial. As prejudice is presumed in such cases, e.g., State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982), Windsor maintains the postconviction court's denial of his application is reversible error.

We need not decide whether the present situation is more properly characterized as a juror misconduct or a right to be present at trial case. Assuming the correctness of Windsor's characterization, the record contains an insufficient demonstration of prejudice. This case comes to us in the context of an application for postconviction relief. Our cases hold that a postconviction proceeding is not an opportunity for litigating issues, such as the present one, that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction

applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code § 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

We need not decide whether Windsor has demonstrated sufficient reason for not bringing this claim earlier as we are convinced he has not demonstrated actual prejudice. Although we presume prejudice in direct appeals in which a violation of the rule governing jury-court communications has been demonstrated, e.g., Griffin, 323 N.W.2d at 201, numerous policy concerns have persuaded our supreme court to impose a higher standard of prejudice upon postconviction applicants. See generally Polly, 355 N.W.2d at 855-56 (discussion of motivating policies). Windsor does not contend in this appeal that he has demonstrated actual prejudice. He relies, rather, on the aforementioned presumption. We think this insufficient. See Frank v. State, 376 N.W.2d 637, 640 (Iowa App. 1985).

Even were we to apply Griffin and similar cases in which prejudice was presumed we would not be inclined to reverse. Such presumed prejudice may be rebutted by the record. As Griffin itself states, "[t]he absence of prejudice may appear from the whole record and need not be established by evidence directed toward this specific point." 323 N.W.2d at 201. The record shows that Burton did not know Glasson well and, in fact, did not even know her last name. His only acquaintance with her was several casual meetings at parties. The district court in the present case found that "the record shows no evidence

of any resulting prejudice to Defendant." We see no reason to disturb that finding. We therefore reject Windsor's first contention.

II.

Windsor argues that the district court erred in denying his request for a new trial which was grounded in a claim of newly-discovered evidence. This evidence consists of testimony by Olatheaus McDaniel, a longtime acquaintance of Windsor. McDaniel stated that on the night of the crime for which Windsor was convicted, he, McDaniel, had seen a man resembling Windsor near the crime scene. This unidentified man was sitting in a car which also resembled that owned by Windsor. McDaniel testified that he had approached the unidentified man thinking it was Windsor and had apologized to the man after realizing his mistake in identification.

In order to prevail on a claim for new trial on the basis of newly-discovered evidence under Iowa Code section 663A.2(4), a defendant must show: (1) that the evidence was discovered after judgment; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982). Such motions are not favored. See Jones, 316 N.W.2d at 910. We will not interfere with the district court's denial of the claim if the findings of fact underlying that denial are supported by substantial evidence and are justified as a matter of law. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). The district court found that Windsor had failed to show that a new trial would probably result in a different outcome. We are not persuaded to disturb this determination.

**AFFIRMED.**