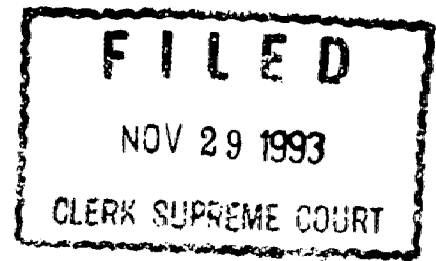


IN THE COURT OF APPEALS OF IOWA

No. 3-546 / 93-145



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MICHAEL A. BARTNICK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury
County, Dewie J. Gaul, Judge.

The applicant appeals a judgment of the district court
denying his application for postconviction relief.
AFFIRMED.

Timothy McCarthy II and F. Montgomery Brown of Cook,
Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, Charles N. Thoman, Assistant
Attorney General, and Thomas S. Mullin, County Attorney,
for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ. Donielson, J., takes no part.

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HAYDEN, J.

In July 1987 defendant Michael Bartnick was found guilty by a jury of two counts of first-degree murder. Bartnick's conviction arose from the shooting deaths of Mary and Cecilia Schoenfeld at their farm home near Charter Oak on June 16, 1986. Mary and Cecilia were the wife and daughter, respectively, of Arlo Schoenfeld, a Crawford County magistrate. Bartnick had previously appeared before Magistrate Schoenfeld on a second-degree theft charge.

At the original trial Bartnick had testified although he did not kill Mary and Cecilia Schoenfeld, he was present when the women were killed. Bartnick testified he, Stehr, and David Jones had gone to Schoenfelds' home to break open a safe so Jones could obtain some documents for use in blackmailing certain Crawford County officials.

The State introduced testimony from numerous witnesses, both relatives and inmates in jail, who testified Bartnick had told them he had killed or planned to kill a judge. The State introduced evidence Jones had hired Bartnick by contract to kill Arlo Schoenfeld. The State also introduced letters written by Bartnick while in prison implicating him in the crime.

This court affirmed Bartnick's conviction. State v. Bartnick, 436 N.W.2d 647 (Iowa App. 1988). The Iowa Supreme Court denied further review. On April 13, 1990, Bartnick filed the present application for postconviction relief. The district court denied Bartnick's application. Bartnick has appealed.

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Postconviction proceedings are law actions, triable to the court, and ordinarily are reviewed on error. Kinnersley v. State, 494 N.W.2d 698, 699 (Iowa 1993) (citation omitted). When there is an alleged denial of constitutional rights, as in this case, our review is de novo. Id. We make an independent evaluation of the totality of the relevant circumstances. Id.

I. Bartnick claims neither of his trial counsel requested the submission of instructions regarding lesser-included offenses of voluntary and involuntary manslaughter. The jury was instructed on first-degree murder and second-degree murder offenses.

To prevail on a claim of ineffective assistance, a postconviction applicant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced applicant. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). Applicant has the burden to prove both of these elements by a preponderance of the evidence. Id.; Taylor, 352 N.W.2d at 685.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

The Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective

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assistance claim. Taylor, 352 N.W.2d at 685. The court quoted Strickland v. Washington:

The 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.

Taylor, 352 N.W.2d at 685 (Strickland, 466 U.S. at 670, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700). Pursuant to Taylor v. State we may affirm applicant's conviction because he has failed to prove prejudice, without deciding whether there was a failure of duty. See Taylor, 352 N.W.2d at 685.

Upon a review of the record in this case, we determine Bartnick has failed to satisfy the prejudice component of an ineffectiveness claim. See Taylor, 352 N.W.2d at 685 (citing Strickland, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674). The evidence appears strong enough to justify a jury verdict of guilty even if trial counsels had proceeded as Bartnick contends they should have. Bartnick has not shown there is a reasonable probability the outcome would have been different if instructions on voluntary and involuntary manslaughter had been submitted to the jury.

In addition we observe there was no factual basis in the record for submission of voluntary manslaughter. A prerequisite for Bartnick to have been convicted of voluntary manslaughter was he acted "solely as the result

of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person" Iowa Code § 707.4 (1985). There is no evidence of such passion in this case. Voluntary manslaughter was not a factually supported lesser-included offense. Conviction for involuntary manslaughter required a finding of defendant acted unintentionally. Iowa Code § 707.5 (1985). Since the jury found Bartnick guilty of first-degree murder, the jury obviously found he acted with intent and, therefore, did not find he unintentionally caused the deaths of Mary and Cecilia. Bartnick was not prejudiced by trial counsels' failure to request the court to submit the lesser-included offense instructions or object after the court did not give the instructions. We affirm the decision of the postconviction court on this issue.

We make no finding of the first prong of the ineffectiveness test as to whether counsel failed to perform an essential duty.

II. Bartnick additionally argues appellate counsel was ineffective for failing to raise on direct appeal the issue of ineffective assistance of trial counsel. Based on our disposition of Bartnick's ineffectiveness claim against his trial counsels, we affirm on this issue.

We affirm the postconviction court's denial of relief.

Costs of this appeal are taxed to Bartnick.

AFFIRMED.