FILED
OCT 0 5 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-313 / 88-810

LARRY JENE ARMSTRONG,

Applicant-Appellant,

vs.

STATE OF IOWA,

Resister-Appellee.

19

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Applicant appeals the denial of his application for postconviction relief. **AFFIRMED.**

Robert E. Weinberg, of Wells, McNally & Bowman, Davenport, for applicant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; Realff Ottesen, Assistant County Attorney, for resister-appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Applicant-appellant Larry Jene Armstrong appeals the denial of his application for postconviction relief. He was charged and convicted of two counts of first-degree murder following the death of his estranged wife and his 20-year-old son. We affirm the trial court's denial of the application for postconviction relief.

We affirmed Armstrong's convictions on direct appeal State v. Armstrong, 376 N.W.2d 635 (Iowa App. 1985). He now alleges he should be granted relief because his trial attorney was not effective. The State contends Armstrong's claims are barred because they were not pursued on direct appeal. See Iowa Code § 663A.8 (1987). Because of our holding, we need not decide whether Armstrong's claims were properly preserved for review.

Review of postconviction proceedings is ordinarily for errors at law, but if, as here, there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo review. Kane v State, 436 N.W.2d 624, 626 (Iowa 1989). For an applicant to establish a claim of ineffective assistance of trial counsel, he must show "1) that counsel's performance was so deficient as not to be functioning as 'counsel' guaranteed by the sixth amendment; and 2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Id. at 627. Counsel is

presumed to be competent; the applicant has the burden to prove, by a preponderance of the evidence, that counsel is ineffective. Id.

Armstrong first contends he was denied effective assistance of counsel when his trial counsel failed to make a proper objection to the introduction of prior bad acts evidence. The prosecutor questioned two witnesses about Armstrong's treatment of his former wives. His trial counsel objected on the grounds of irrelevancy. The prosecutor argued the answers would show Armstrong's violent nature. The trial court overruled the objection.

Armstrong contends his counsel should have made an objection under Iowa Rule of Evidence 404(b), which provides evidence of other acts is not admissible to prove a person's character in order to show he acted in conformity therewith. At the postconviction hearing, trial counsel testified he considered filing a motion in limine, but decided it was unnecessary. He did not think the jury would find the two witnesses credible. A reasonable decision by counsel will not be interfered with simply because that strategy was unsuccessful. State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984); Frank v. State, 376 N.W.2d 637, 641 (Iowa App. 1985). Trial counsel made a reasonable calculation as to the best way to handle the testimony. Even if we were to disagree with that decision, we do not feel the testimony resulted in undue prejudice to Armstrong. See Kane, 436 N.W.2d at 627.

Armstrong next contends his trial counsel was ineffective in failing to move for a mistrial based on prosecutorial misconduct. During the trial, defense counsel commented it was hard to tactfully criticize the victims in any way without "damn[ing] them in their graves." In making his closing argument, the prosecutor mentioned how Armstrong's trial counsel had referred to society's disapproval of the victims' behavior. The prosecutor argued such a belief did not entitle the defendant to impose the "death penalty" upon the victims. The prosecutor stated Armstrong's attorney damned the victims in their graves and damned him for that Armstrong's attorney objected. The objection was sustained, and the jury was admonished to disregard the prosecutor's remarks. Armstrong's attorney testified that he considered making a motion for mistrial after closing arguments, but he felt the case was going to go to the jury no matter what, since the trial had gone on for as long as it had. Armstrong's attorney made a motion for mistrial after the jury returned from deliberations.

Armstrong argues his trial attorney should have made the motion after closing arguments, because the atmosphere in the court at that time was very tense and emotional, and the trial court would have been more inclined to grant the motion. Trial counsel's decisions regarding strategy will not be interfered with merely because the strategy was

23

unsuccessful. Losee, 354 N.W.2d at 243; Frank, 376 N.W.2d at 641. Armstrong has not shown his trial counsel's decision regarding the mistrial motion was so unreasonable as to prove ineffectiveness. See Frank, 376 N.W.2d at 641.

Armstrong next contends his trial counsel was ineffective in failing to rebut testimony regarding the location of certain evidence in Armstrong's car. Armstrong testified on the night of the murders, he purchased the murder weapon, a knife, at a local K-Mart store, intending to use it merely to frighten his wife. At trial, a sheriff's deputy testified he found the paper sack from the knife purchase under the rear part of the front passenger seat of Armstrong's car. The deputy testified he believed Armstrong had planned the murders. Armstrong claims the sack could not have been under the seat, and he contends the deputy's testimony indicates Armstrong had hidden the sack because he was planning to commit the murders. Armstrong's trial counsel testified at the postconviction hearing it never occurred to him to attack the testimony regarding the sack.

Trial counsel's actions concerning this testimony did not constitute ineffective assistance. Ample evidence of premeditation existed at trial. State v. Armstrong, 376 N.W.2d 635, 637 (Iowa App. 1985). Thus, even if we were to find trial counsel should have rebutted testimony as to the location of the sack, the failure to do so did not

prejudice Armstrong and deny him a fair trial. See Kane, 436 N.W.2d at 627.

Armstrong's final contention is his trial counsel was ineffective under the totality of the circumstances. Even though no specific conduct of counsel amounts to ineffective assistance, combined acts or errors may have violated Armstrong's sixth amendment right to counsel Wycoff v. State, 382 N.W.2d 462, 473 (Iowa 1986) Armstrong has not met his burden of proving his trial counsel was ineffective. We find trial counsel's performance was professionally reasonable. In light of the overwhelming evidence against Armstrong, any errors that may have occurred did not affect the outcome of the trial or prejudice the defendant. See Kane, 436 N.W.2d at 627, Losee, 354 N.W.2d at 243.

We affirm the district court's denial of postconviction relief.

AFFIRMED.