FILED
MAY 30 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-135 / 94-0414

BEN LANGFORD,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Vern L. Robinson, Judge.

Langford appeals from the district court ruling denying his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of the Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, J. Patrick White, County Attorney, and Rod Reynolds, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., Cady and Huitink, JJ.

HABHAB, P.J.

On October 20, 1988, Ben Langford was charged by trial information with one count each of first-degree robbery, second-degree theft, and possession of a schedule II controlled substance, stemming from an armed robbery at the Revco Drug Store in the Wardway Plaza in Iowa City. Defense counsel filed pretrial motions to suppress evidence, to suppress identification of Langford by witness Harlan Yoder, and a motion in limine to prevent the prosecution from introducing evidence of prior bad acts. The district court denied the motions to suppress, but did not rule on the motion in limine.

At trial, Kathy Gaal, Langford's girlfriend, testified Langford was with her watching television on the night of the robbery. However, Steve Eldridge, an acquaintance of Langford, testified he was involved in the robbery. Eldridge stated Langford was the gunman who forced the Revco pharmacist to turn over the drugs to him. Eldridge had earlier negotiated a plea with the county attorney's office whereby he received a fifteen-year sentence on lesser offenses in exchange for his agreement to talk freely about the crime.

Both the drug store clerk and the pharmacist, Harlan Yoder, identified Langford as the gunman. Yoder identified Langford from a photographic lineup. The store clerk identified another man as the robber but in court identified Langford as the perpetrator. Defense counsel's motion to suppress identification by Yoder was denied. Defense counsel did not file a pretrial motion to prevent the store clerk from making an in-court identification.

Defense counsel asked Langford about prior convictions. Langford admitted he had a prior felony conviction. Defense counsel did not object, however, when the district court failed to give the jury a limiting instruction on the weight to be given this admission. Counsel also did not file a motion in limine to prevent the prosecution

from asking defense witnesses about Langford's prior bad acts. During Gaal's testimony, the prosecution asked her questions about Langford's prior bad acts.

The jury found Langford guilty as charged. All parties were under the assumption Langford was subject to the habitual offender statutes governing sentencing. The district court sentenced Langford to a twenty-five-year term of imprisonment on the robbery charge, a one-year sentence on the possession charge, and a fifteen-year sentence on the theft charge based on the habitual offender enhancements pursuant to Iowa Code chapter 908.

Langford appealed. The court of appeals generally affirmed his conviction, but remanded for resentencing on the theft charge because trial counsel was ineffective in failing to note that Langford was not subject to the habitual offender provisions. On remand, Langford obtained a ten-year reduction in his sentence.

Langford subsequently filed the present petition for postconviction relief. Langford contended that, by asking him about prior felonies without ensuring that a limiting instruction was given, trial counsel violated one of his essential duties which resulted in prejudice at trial. He also claimed trial counsel failed to obtain a motion in limine ruling preventing an in-court identification by the drug store clerk. Langford further argued trial counsel failed to obtain a ruling on his motion in limine to prevent the prosecution from suggesting Langford had intimidated witnesses. Last, he maintained trial counsel was ineffective in failing to recognize that he was not subject to the habitual offender statutes. He insisted that not only was he prejudiced in the sentencing procedures but his plea process was also tainted with prejudice. The district court dismissed the petition.

Langford appeals.

I. 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).

However, when 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.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). To prove prejudice, an applicant must show 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, 2086, 80 L. Ed. 2d 674, 698 (1984).

As it is a two prong test, Langford must satisfy both the duty prong and the prejudice prong in order to prevail on an ineffective assistance of counsel claim. If he cannot satisfy one of the prongs, his claim will fail. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1983) (an ineffective assistance claim will fail on direct appeal if one of the prongs is not satisfied).

In evaluating counsel's performance, we presume counsel acted competently. *See id.* at 131. Defendant is not entitled to perfect representation, but only that which is within the range of normal competency. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987).

II. Jury Instructions. Langford has two contentions regarding the district court's failure to give certain instructions. His first claim is the district court should have given an instruction limiting the jury's consideration of testimony given by Langford that he had a prior felony conviction. His second contention was the district court should have given an instruction on eyewitness identification.

A. Testimony regarding a prior felony conviction. At trial, Langford's defense counsel asked Langford whether he had ever been convicted of a felony. Langford simply stated, "Yes, I have." This topic was not pursued in cross-examination. Langford claims his attorney was ineffective for failing to object to the district court's failure to give a jury instruction limiting the jury's use of such testimony.

Without addressing the duty prong of the ineffective assistance of counsel test, we determine this claim must fail since Langford cannot meet the prejudice prong of the test. We find Langford did not suffer any prejudice from his counsel's failure to object, because there is no reasonable probability the outcome would have been different due to the overwhelming evidence against him. Both victims of the robbery, a clerk and the pharmacist, identified Langford as one of the robbers.[1] Langford's accomplice testified as to Langford's participation in the crime. Police found a gun in Langford's apartment which, according to Langford's accomplice, was the one used in the robbery. The pharmacist also identified the gun as similar to the one used in the robbery. Police found eight types of prescription drugs in Langford's apartment, all of which were consistent with the prescription drugs stolen in the robbery. We find Langford suffered no prejudice as a result of this claim.

B. Eyewitness identification. Langford also has a claim dealing with the eyewitness identification made by the pharmacist. He contends his counsel was ineffective for failing to object to the district court's failure to instruct the jury on eyewitness identification.

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[1] The pharmacist identified Langford in a photo array. The clerk made an in-court identification.

We choose to dispose of this issue in the same manner as the issue above.[2] Without deciding the duty prong, we determine this claim must also fail since the prejudice prong cannot be met. Langford, once again, did not suffer any prejudice from his counsel's failure to object because there is no reasonable probability the outcome would have been different due to the overwhelming evidence against him.

III. In-court identification. At trial, the clerk at the drug store made an in-court identification of Langford. Langford asserts the identification was unreliable since the clerk could not make an out-of-court identification of Langford, and possibly even tainted because the clerk saw Langford at her deposition the week before trial. As a result, Langford contends his counsel was ineffective for failing to file a motion in limine to exclude the clerk's in-court identification.

We find the in-court identification made by the clerk to be cumulative to the testimony by Langford's accomplice and the identification made by the pharmacist. We further find, since this was cumulative testimony, there is no reasonable probability the verdict would have been different had Langford's counsel filed such a motion and succeeded in suppressing the in-court identification. This claim must fail.

IV. Alleged threat made by Defendant. Defense counsel filed a motion in limine to prevent the prosecution from making references to rumors that Langford had put a gun to the head of his alibi witness, his girlfriend Kathy Gaal. This motion was never ruled upon. During the State's cross-examination of Gaal, the following exchange took place.

> Q: Ms. Gaal, has Mr. Langford ever done anything to you that would affect your testimony here today?
> BY MS. BECKER: Objection, Your Honor, it's immaterial and irrelevant.

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[2]The district court did give the general instruction on the credibility of witnesses.

BY MS. POEPSEL: Your Honor, it goes directly to the witness' credibility.
BY THE COURT: The answer is already in.
BY MS. POEPSEL:
Q: I missed your answer.
A: I said, no, he has not.
Q: So you are not afraid of the Defendant?
A: No.
Q: Has the Defendant ever held a gun to your head?
A: No.
Q: Would you have ever told anyone that he did?
BY MS. BECKER: I'm going to object, it's immaterial and irrelevant.
BY MS. POEPSEL: It goes to Ms. Gaal's being afraid of the Defendant.
BY THE COURT: Sustained.
BY MS. BECKER: And I'd ask if the jury may disregard the remarks of Ms. Poepsel?
BY THE COURT: The jury shall disregard the question and the answer.
BY MS. POEPSEL:
Q: Okay, would you have ever told anyone that you were scared of the Defendant?
BY MS. BECKER: I'm going to object again; same objection, immaterial and irrelevant as to whether the Defendant is guilty of these charges.
BY THE COURT: Objection sustained.

Langford's counsel did not request a mistrial. Langford contends he received ineffective assistance of counsel due to the failure to pursue a ruling on the motion in limine and the failure to seek a mistrial after the above-quoted testimony took place.

This claim of ineffective assistance must fail because, once again, we find no prejudice.[3] Generally, an improper statement is not unduly prejudicial when the district court admonishes the jury to disregard it. *State v. Bishop*, 387 N.W.2d 554, 561 (Iowa 1986); *State v. Williams*, 315 N.W.2d 45, 55-56 (Iowa 1983). We find the admonishment, in this particular instance, relieved Langford of any prejudicial effect the objectionable questions might possibly have had. As Langford suffered no

[3]We have not been asked to determine the correctness of the district court's ruling.

prejudice by the remarks made by the prosecuting attorney, he also did not receive ineffective assistance due to his attorney's failure to not seek a ruling on the motion in limine and the failure to seek a mistrial.

V. Plea bargaining. Langford's final claim deals with the representation he received in the plea bargaining stage of his case. As was found on the direct appeal of his conviction, everyone involved in the case had been working under the incorrect assumption that Langford was subject to the habitual offender sentencing statute. Langford contends he received ineffective assistance of counsel because his counsel mistakenly believed Langford was a habitual offender during the plea bargaining process. Langford further contends that if his counsel had not made this mistake, he would have received more favorable plea bargaining offers from the State.

Testimony by the county attorney revealed that the State had no intention of entertaining a plea of lower than first-degree robbery due to the strong evidence it had in the case. The county attorney stated this would have been the State's position regardless of whether Langford was a habitual offender or not. In other words, while Langford's status as an alleged habitual offender effected the sentencing, it did not have any affect on the State's position in the plea bargaining. We conclude Langford suffered no prejudice in the plea bargaining as a result of the misunderstanding regarding the habitual offender statute. This claim of ineffective assistance of counsel must also fail.

AFFIRMED.