IN THE COURT OF APPEALS OF IOWA

No. 0-060 / 09-696
Filed March 10, 2010

DENNIS E. STONEROOK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Mills County, Timothy O'Grady, Judge.

Applicant appeals the dismissal of his application for postconviction relief.

AFFIRMED.

Marti D. Nerenstone, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Marci Prier, Mills County Attorney, and Eric Hansen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Dennis E. Stonerook appeals from the district court's dismissal of his petition for postconviction relief. We affirm.

I. BACKGROUND. On February 13, 2005, Stonerook entered a bowling alley in Glenwood, Iowa, and shot and killed Donald Mayberry. He was charged with murder in the first degree in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (2005). Stonerook's, trial counsel, Joseph Hrvol, filed a motion for a change in venue contending Stonerook could not obtain a fair trial in Mills county because (1) the shooting occurred in the county seat and the jury pool was tainted because news of the shooting probably pervaded the county's small population, and (2) newspaper articles about the shooting expressed negative allegations about Stonerook and positive opinions about Mayberry. The court denied the motion, finding there was not a sufficient showing of prejudice. It did acknowledge that such a showing of prejudice could become apparent during jury selection, and for that reason, it asked the attorneys to have a courtroom reserved in Pottawattamie County. It concluded that if prejudice became apparent during jury selection, the trial would be continued and held in Pottawattamie County.

Stonerook's attorney did not request that voir dire be reported. A jury was selected and trial held in Mills county from September 13 to 19, 2005. At trial, Stonerook never denied that he committed the shooting, but relied on the defenses of insanity, voluntary intoxication, and diminished capacity. He argued that due to brain damage from a stroke, long-term alcohol abuse, and his blood alcohol concentration at the time of the shooting, he was unable to form the

specific intent required to be found guilty of murder in the first degree. The jury returned a verdict of guilty and Stonerook was sentenced to life imprisonment. Stonerook appealed claiming the jury was not properly instructed, and we affirmed his conviction in *State v. Stonerook*, No. 05-1917 (Iowa Ct. App. Dec. 28, 2006).

Stonerook filed a petition for postconviction relief in June 2007, and the issues came on for trial on April 2, 2009. Stonerook and his trial counsel, Joseph Hrvol, testified. The district court dismissed the petition on each ground asserted. It found (1) Stonerook failed to prove he was prejudiced by the court's failure to grant his motion for change of venue, (2) he did not prove Hrvol breached an essential duty or that he was prejudiced by not having voir dire reported, (3) there was substantial evidence to support the jury's findings that Stonerook was sane and did not have diminished capacity at the time of the shooting, and (4) appellate counsel was not ineffective for failing to raise any of the above issues on direct appeal. Stonerook appeals.

II. CHANGE OF VENUE. We review a ruling on a motion for change of venue de novo. *State v. Newell*, 710 N.W.2d 6, 33 (Iowa 2006); *State v. Wedebrand*, 602 N.W.2d 186, 188 (Iowa Ct. App. 1999). Nonetheless, reversal is only warranted if the district court abused its discretion in refusing to move the trial. *State v. Evans*, 671 N.W.2d 720, 726 (Iowa 2003); *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990). A court may transfer a trial to another county,

> [i]f the court is satisfied from a motion for a change of venue and the evidence introduced in support of the motion that such degree of prejudice exists in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county . . . .

Iowa R. Crim. P. 2.11(10)(*b*). An abuse of discretion in denying a motion for change of venue is shown when the party alleging the error proves (1) the publicity surrounding the trial is so pervasive and inflammatory that prejudice must be presumed, or (2) there was actual prejudice by the jury that served. *Siemer*, 454 N.W.2d at 860; *State v. Spargo*, 364 N.W.2d 203, 207 (Iowa 1985). In evaluating whether the publicity is presumptively prejudicial, we examine "the nature, tone, and accuracy of the articles; their timing in relation to the trial; and the impact of the publicity on the jurors as revealed through voir dire." *Evans*, 671 N.W.2d at 726. The ultimate question is whether, due to publicity or another cause, "a substantial number of prospective jurors hold such fixed opinions on the merits of the case that they cannot impartially judge the issues to be determined at trial." *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989).

Stonerook contends he could not obtain a fair trial in Mills county because of its small population and several newspaper articles about the shooting portrayed Stonerook in a negative light and gave positive opinions about the victim. We disagree that these circumstances tainted the jury pool. The articles were largely factual and were published several days after the shooting, and more than six months prior to jury selection. *See Wedebrand*, 602 N.W.2d at 188-89 (noting that the court considers the timing and accuracy of media reports in evaluating their prejudicial effect and finding no error in refusing to change venue when coverage was factual); *State v. Hoeck*, 547 N.W.2d 852, 861 (Iowa Ct. App. 1996) (stating that in determining the prejudice of news reports, "[w]e also look to see whether enough time had passed between the accounts and the trial date to dissipate any prejudicial effect of adverse publicity"). Stonerook also

argues that allowing the media expanded coverage of the trial and proceedings demonstrates prejudice. This general allegation does not show how the expanded coverage prejudiced potential jurors or actual jurors in the case. "Mere exposure to news accounts does not amount to a substantial likelihood of prejudice." *State v. Walters*, 426 N.W.2d 136, 138 (Iowa 1988).

The bare fact that Mills county is rural and has a sparse population also does not show prejudice. In *State v. Robinson*, 389 N.W.2d 401, 403 (Iowa 1986), in determining that a change in venue was required, the court took note that the county at issue was rural and sparsely populated. However, it found prejudice was established because the defense provided affidavits showing that the small population had been saturated with news accounts of the crime. *Robinson*, 389 N.W.2d at 402-03. There is no such showing here. Only a few articles were published about the shooting. They did indicate Stonerook's involvement but Stonerook never denied committing the shooting. His defenses were based on his state of mind and the articles did not express views on this issue.

Stonerook also claims there was actual prejudice on the part of the jury that served in his case. To support this claim he testified at the postconviction hearing about how one prospective juror knew Stonerook, another cried during voir dire, and a third expressed a fixed opinion that Stonerook was guilty. From the transcript of the postconviction hearing, it appears none of these persons actually served on the jury. Stonerook did not remember any other concerning moments during jury selection. Stonerook's trial attorney, Joseph Hrvol,

expressed his view that Stonerook could not get a fair trial in Mills county. He stated that there was nothing that a potential juror said that concerned him,

> but rather the idea that this kind of a crime would be so pervasive, at least the information about it, and people talk. It was mainly based on that gut feeling that the idea how could anyone not know something about the facts of this case and form an opinion?

Hrvol also testified that they conducted an exhaustive jury selection where "[a]nyone who had any inclination or any recollection of the events was pretty much struck from the jury panel before it got into any in-depth observations about their specific knowledge to share with others." He testified that he did not believe any of the potential jurors Stonerook identified as showing bias served on the actual jury. Stonerook has failed to prove there was actual prejudice on the jury that served. *See State v. Morgan*, 559 N.W.2d 603, 611 (Iowa 1997) (finding no actual prejudice when all jurors who expressed a strong opinion on the case were excluded from the jury). His claim that the district court abused its discretion in failing to grant his motion for change of venue therefore fails.

III. ATTORNEY'S FAILURE TO HAVE VOIR DIRE REPORTED. Stonerook next contends if he cannot prove he suffered prejudice due to the court's failure to move the trial, it is because of Hrvol's ineffective assistance. Hrvol did not request reporting of voir dire so there is not a transcript documenting any errors in jury selection.

We review ineffective assistance of counsel claims de novo, making an independent evaluation of the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007). To establish an ineffective assistance of counsel claim the applicant must prove that the attorney failed to perform an essential duty and the client suffered prejudice from this failure. *State v. Canal*, 773

N.W.2d 528, 532 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). We may dispose of a claim of ineffective assistance if there is a lack of proof on either element. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). To prove that he suffered prejudice from Hrvol's failure to have voir dire reported, Stonerook must prove "there is a reasonable probability that, but for the . . . unprofessional errors, the result of the proceeding would have been different." *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (citations omitted). The applicant does not need to prove that counsel's conduct, more likely than not, affected the outcome. *State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003). He must show that the probability of a different result is "'sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

Attorneys should request a record be made of voir dire when a motion for change of venue is overruled prior to trial. *See State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972) ("[W]hen motions to change venue are overruled, counsel on both sides would be well advised to have voir dire examination of the jury reported."). Nevertheless, even if we considered Hrvol's failure to have voir dire reported to be a breach of essential duty, Stonerook has not proved he was prejudiced by this. He does not identify any specific errors that would be shown in a record of these proceedings. As detailed above, his testimony and that of Hrvol show that any potential juror with strong feelings about the case or familiar with those involved, was excluded from the jury. Neither Stonerook or Hrvol recalled any unusual circumstances that suggest prejudice on the part of the actual jurors. *See State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000) (rejecting

a claim of ineffective assistance of counsel on the ground that counsel failed to have voir dire and opening and closing arguments reported because he did not "assert any specific error occurred during the course of those proceedings, or that he was prejudiced as a result of his trial counsel's representation"). This claim is therefore without merit.

IV. MOTION FOR A NEW TRIAL. Stonerook next asserts that the trial court erred in failing to grant his motion for a new trial. He claims the trial court employed a wrong standard in ruling on the motion by looking to the sufficiency, rather than the weight of the evidence. The State argues Stonerook failed to preserve error on this issue. We agree that Stonerook failed to preserve error on this issue. Even though Stonerook raised this issue in his application for postconviction relief and at the hearing, the district court's ruling does not address this issue. Stonerook did not file a post-trial motion to obtain a ruling on this issue. We therefore conclude error was not preserved on this issue. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) ("Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court."); *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002). Even if error was preserved, we find the court did not abuse its discretion in denying the motion as the greater weight of the evidence supports the jury's verdict. *See State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008) (finding a court did not abuse its discretion in denying a motion for a new trial because the appellate court found, from its review of the record, that the greater weight of the evidence supported the jury's verdict).

V. INEFFECTIVE ASSISTANCE OF APPELLATE ATTORNEY. Stonerook also contends he had ineffective assistance of appellate counsel. He contends appellate counsel was ineffective in failing to raise on direct appeal, any of the issues Stonerook now pursues in his application for postconviction relief. We, like the district court, conclude that Stonerook cannot prove he was prejudiced by his appellate attorney's failure to raise these issues. As outlined above, Stonebrook has failed to establish any claimed error caused prejudice. Therefore, his appellate attorney was not ineffective in failing to raise meritless issues on direct appeal. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998) (providing that counsel is not ineffective for failing to pursue issues without merit).

VI. CONCLUSION. We affirm the district court's dismissal of Stonerook's application for postconviction relief. He failed to establish any prejudice resulted from the district court's denial of his motion for change of venue or his attorney's failure to have voir dire reported. Stonerook's remaining claims are likewise without merit.

AFFIRMED.