IN THE COURT OF APPEALS OF IOWA

No. 1-186 / 09-1889
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY DUANE SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Smith appeals his conviction and sentence for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds and Thomas J. Gaul, Assistant Appellate Defenders, for appellant.

Jeffrey Duane Smith, Anamosa, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Scott Brown, and Douglas Hammerand, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple and Charity McDonnell, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

Jeffrey Smith appeals his conviction and sentence for first-degree murder. Smith's appellate counsel argues trial counsel rendered ineffective assistance of counsel by waiving Smith's right to have the jury instructed on the lesser-included offenses to first-degree murder. Smith's counsel also argues the district court imposed an illegal sentence and requests a remand to the district court for a clarification of the sentencing order to limit the amount Smith has to pay for attorney fees. Additionally, Smith raises several pro se claims. Upon our review, we affirm Smith's conviction and sentence, and we preserve his ineffective assistance of counsel claim for possible postconviction relief proceedings.

***I. Background Facts and Proceedings*.**

On July 9, 2009, defendant Jeffrey Smith[1] was charged with first-degree murder for the death of Tonyeah Jackson. Viewed in the light most favorable to the State, the jury could have found the following facts:

Smith was known by his nickname "J-Rich." He owned a 9 mm pistol with a laser sight that projected a red beam onto an intended target. He also owned a blue Chevrolet Monte Carlo.

During the early evening hours of July 9, 2009, Smith was at the residence of his girlfriend, Terrell Smith. Terrell told Smith she wanted to end their relationship. They argued, and Smith became angry and upset. Smith kicked a door down and broke a glass coffee table. Terrell wanted Smith to leave her home, so she called her cousin, Tonyeah Jackson, and asked him to come over

[1] Defendant/appellant Jeffrey Smith will be referred to as "Smith" throughout this opinion. Multiple persons mentioned in this opinion have the same last name, so they will be referred to herein by their first name or nickname.

and make Smith go away. Jackson arrived a few minutes later and ultimately hit Smith in the face. Smith then left Terrell's residence, angry and crying.

Later in the evening, Jackson and his friend Niketa Smith decided to go to a bar called Club Crystyles. On the way, Jackson received a call from Smith. When Jackson and Niketa arrived at the bar there were approximately nineteen people there, including Larhondrae "Bud" Dunn and his sisters, Shylandra and Shytari Dunn. Laquanda Simpson and Simpson's aunt and two cousins were also at the bar.

While Jackson and Niketa played pool, Smith came into the bar with a gun projecting a red beam. Several persons in the bar saw the red beam. Smith exchanged words with Jackson, and Smith then fired three or four shots at Jackson.

Jackson died as a result of multiple gunshot wounds and was pronounced dead at the scene. Four cartridge casings from a 9 mm automatic pistol were found at the scene. Two bullets recovered during the victim's autopsy had been fired from a 9 mm pistol; a third bullet recovered during the autopsy could also have been fired from the same pistol.

Prior to the shooting, Shylandra's boyfriend, Marlon Earsery, called Shylandra's cell phone. Earsery was incarcerated at the time in the Black Hawk County Jail and used the jail's phone to place his call to Shylandra. All calls from inmates of the jail were subject to monitoring and recording, and the calls between Shylandra and Earsery that night were recorded.

Many parts of the calls are difficult to hear or understand on the audio recordings. Initially, Earsery and Shylandra conversed about who was at the bar.

Earsery later asked Shylandra to talk to Bud. Bud took Shylandra's phone and walked outside the bar to talk to Earsery. During their conversation, gunshots can be heard in the background. Immediately after the gunshots were fired, Bud told Earsery that J-Rich had burst into the club shooting. Bud told Earsery that he had to go check on his sisters, and he went back into the club. Bud gave the phone back to Shylandra, who then immediately told Earsery, "Mother-f***ing Jeff just killed somebody in front of my face." Earsery asked Shylandra, "Who?," to which Shylandra replied, "J-Rich just killed Tonyeah in front of my face." She explained she saw Smith come into the bar and she noticed the beam on his gun. She stated she thought he was just playing, but then he fired the gun. She told Earsery she was "standing right there" when Smith fired. She stated she took off running towards the VIP room in the bar, and Jackson followed her. She said that Jackson collapsed in the VIP room, and he had been shot multiple times.

Earsery and Shylandra's conversation continued for a few more minutes, and Shylandra continued to give Earsery details of the shooting and the events going on at that time. Shylandra was very upset during their conversation. Their conversation was interrupted by the operator informing them they had one minute left to talk. Earsery then called Shylandra right back, and their conversation concerning the shooting and the events continued. The trial court admitted both calls into evidence at trial, finding the excited utterance exception to the hearsay rule was applicable to both calls.

After the shots were fired and Bud had gone back into the bar, he called 911 on his own phone. He told the operator Jackson had been shot and J-Rich

was the shooter. He told the operator the shooter left in "like an Aurora" he believed to be black or purple in color.

Officers arrived on the scene and spoke to several of the bar's patrons. Laquanda Simpson told an officer she had been inside of the club and she saw what appeared to be like a beam of light. She said she saw the light on Jackson and then she heard some shots. Simpson identified J-Rich as the shooter. Bud spoke with an officer at the scene, but he gave the officer a false name and did not tell any of the officers what he had observed that night. Niketa left after officers arrived and did not speak to them that night. Shylandra spoke with an officer at the scene and gave the officer her name, but told the officer she did not know who the shooter was.

Smith was later seen at Frances and Ira Harrington's house on Crescent Place, which is located three-tenths of a mile from the club. Smith's blue Monte Carlo was seen stopping on Crescent Place, and Smith was seen getting out of the passenger seat of the car. Smith arrived at the Harringtons' house in a "really nervous," "shaky, upset" state. Smith told Frances he needed Ira to give him a ride home. Ira arrived and transported Smith to his apartment. Smith asked a tenant of a neighboring apartment if he could use a bicycle. Smith told the tenant he was leaving and his neighbors could take anything they wanted from his apartment. The next morning, Smith's car was found abandoned on a Waterloo street with the keys in the ignition. Smith was arrested thereafter.

Officers later learned of the recorded conversation between Earsery and Shylandra and Bud. A material witness warrant was issued for Bud, and Bud then spoke to the investigating officer concerning the shooting. He told the

officer that J-Rich was the shooter. He later told police that he believed he saw a blue or black Monte Carlo the night of the shooting, not an Aurora as he previously had stated. Shylandra was also subpoenaed to give a statement, and she identified J-Rich as the shooter. Niketa also gave a statement to police at that time, identifying Smith as the shooter.

A jury trial commenced on July 14, 2009. At the close of all evidence, Smith's motion for judgment of acquittal was denied. Thereafter, the jury found Smith guilty as charged. Smith was sentenced to a life sentence on November 20, 2009.

Smith now appeals.

***II. Discussion*.**

On appeal, Smith's appellate counsel argues trial counsel rendered ineffective assistance of counsel by waiving Smith's right to have the jury instructed on the lesser-included offenses to first-degree murder. Smith's counsel also argues the district court imposed an illegal sentence and requests a remand to the district court for a clarification of the sentencing order to limit the amount Smith has to pay for attorney fees. Additionally, Smith raises several pro se claims. We address his arguments in turn.

***A. Smith's Appellate Counsel's Arguments*.**

***1. Ineffective Assistance of Counsel*.**

Smith contends his trial counsel rendered ineffective assistance of counsel by waiving his right to have the jury instructed on the lesser-included offenses to first-degree murder. We conduct a de novo review of ineffective assistance of counsel claims. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010).

"To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure." *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). A defendant's inability to prove either prong defeats the claim of ineffective assistance of counsel. *Id*. Although we normally preserve ineffective assistance of counsel claims for postconviction relief actions, we consider the merits of such claims on direct appeal if the record is adequate. *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010). However, "[o]nly in rare cases will the trial record alone be sufficient to resolve the claim. 'Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.'" *State v. Bentley*, 757 N.W.2d 257, 264 (Iowa 2008) (citation omitted). "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (internal citation omitted). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Furthermore, a defendant's conduct is examined as well as that of his attorney in assessing claims of ineffective assistance of counsel. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

In this case, we find the record is insufficient to address Smith's ineffective assistance of counsel claim on direct appeal. Smith's trial counsel has had no opportunity to explain his strategy and actions in deciding the jury should not be

instructed on the lesser-included offenses to first-degree murder. It is unclear under this record whether Smith requested or agreed with the decision not to submit the lesser-included offenses to the jury. We therefore preserve his claim for possible postconviction relief proceedings.

***2. Illegality of Sentence*.**

Smith contends the court imposed an illegal sentence by ordering him to pay attorney fees without setting a limit on the amount he had to pay, alleging such order violates *State v. Dudley*, 766 N.W.2d 606, 622 (Iowa 2009). Our review of challenges to the legality of a sentence is for correction of errors at law. *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). Therefore, we will examine the sentence to determine whether it complies with the relevant statutes. *State v. Maxwell*, 743 N.W.2d 185, 190 (Iowa 2008).

As part of the sentence imposed, under a separately numbered "Restitution" paragraph, Smith was required to "make restitution for attorney fees pursuant to section 815.9, Code of Iowa [2009], for all costs incurred . . . ." Under a separately numbered "Court Costs" paragraph, the court's sentencing order further stated: "Pursuant to Code of Iowa section 910.2, [Smith] shall pay and judgment is imposed against [Smith] for court costs in the amount of $22,409.06." Under another separately numbered paragraph, the order stated: "[Smith] shall make restitution for attorney fees pursuant to section 815.9, Code of Iowa, for all costs incurred, and judgment is ordered for the same." Besides the amount stated for "court costs," there is no specific amount designated in the order for the amount of attorney fees Smith was required to pay.

Iowa Code section 910.2(1) provides, in relevant part:

> In all criminal cases in which there is a . . . verdict of guilty, . . . the sentencing court shall order that restitution be made by each offender . . . to the clerk of court for fines, penalties, surcharges, and, to the extent that the offender is reasonably able to pay, for crime victim assistance reimbursement, restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b", *court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, when applicable*, ...

(Emphasis added.) Under the statute, "court-appointed attorney fees" and "court costs" are separate and distinct items of restitution. *See* Iowa Code § 910.2(1); *see also* 1989 Iowa Op. Att'y Gen. 34 ("By using a comma between 'court costs' and 'court-appointed attorney's fees or the expense of a public defender,' the legislature must have intended that court costs and attorney fees be separate and distinct items of restitution.").[2]

The record before us is not a model of clarity. We do not know the basis for the $22,409.06 court costs figure. At oral argument, counsel was unable to state whether or not the court costs figure included attorney fees. The record simply does not support the conclusion that Smith was ordered to pay a sum certain for attorney fees. Until such time as it is determined that Smith has been ordered to pay attorney fees in excess of applicable limits, his *Dudley* challenge is premature.

[2] While we are not bound by an opinion of the attorney general, we do give it respectful consideration. *Bradley v. Iowa Dep't of Pers.*, 596 N.W.2d 526, 530 (Iowa 1999); *City of Clinton v. Sheridan*, 530 N.W.2d 690, 695 (Iowa 1995); *Woodbury Cnty. v. City of Sioux City*, 475 N.W.2d 203, 207 (Iowa 1991).

***B. Smith's Pro Se Arguments*.**

***1. Evidentiary Rulings*.**

a. Phone Call. Smith argues the court erred in admitting the second call between Shylandra and Earsery under the excited utterance hearsay exception. There is no dispute that the statement is hearsay. Iowa R. Evid. 5.801(*c*). "The State, as proponent of the hearsay evidence, has the burden of proving it falls within an exception to the hearsay rule." *State v. Cagley*, 638 N.W.2d 678, 681 (Iowa 2001). The State argues the second call was admissible as an excited utterance, and that even if the district court erred in admitting the call, it was harmless error. We review Smith's hearsay claims for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

Smith argues Shylandra's statements to Earsery were not excited utterances since that conversation was narrative and not reactive, and was made after the incident. The State asserts Shylandra's statements were spontaneous, made while Shylandra was still in an excited state, and that the stress of the traumatic event had persisted into the immediate second phone call. Excited utterances, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is not excluded by the hearsay rule. Iowa R. Evid. 5.803(2). Application of the rule has been the subject of numerous appellate court opinions. *See, e.g.*, *State v. Tejeda*, 677 N.W.2d 744, 753-54 (2004); *Cagley*, 638 N.W.2d at 681; *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999); *State v. Shortridge*, 589 N.W.2d 76, 82 (Iowa Ct. App. 1998). An analysis of those opinions is not necessary here because we find no prejudicial error.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Iowa R. Evid. 5.103(*a*). The rule "requires a harmless error analysis where a nonconstitutional error is claimed." *Newell*, 710 N.W.2d at 19. Under this analysis we ask: "'Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?'" *Id*. (citation omitted). We presume prejudice unless the record affirmatively establishes otherwise. *Id*.

Notwithstanding the presumption of prejudice, "erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *Id*. Substantially the same evidence is properly in the record through the admission of the first call between Earsery, Shylandra, and Bud. Additionally, Shylandra's testimony at trial was consistent with her statements in the second call. With substantially the same evidence in the record, we find no prejudicial error in the admission of the second call between Shylandra and Earsery. We accordingly affirm on this issue.

***b. Phone Call Transcripts*.** Transcripts were made of the phone calls between Shylandra, Earsery, and Bud. The State requested that the jurors be given the transcripts when the calls were played for the jury to help the jurors follow along as they were listening. Smith objected, arguing the transcripts unduly highlighted the evidence. The court ruled that transcripts should be available to the jury during the time the calls were played for the jury to aid the jurors' understanding.

Smith contends the court erred in allowing transcripts generated from both phone calls to be given to the jury because the transcripts were unreliable and highly prejudicial to him. Review of evidentiary claims is for an abuse of discretion. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010). An abuse of discretion occurs when the district court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*. (quoting *State v. Maghee*, 573 N .W.2d 1, 5 (Iowa 1997)).

Upon our review, we find no merit to this claim. *See State v. Allen*, 565 N.W.2d 333, 339 (Iowa 1997) (concluding the trial court in that case did not abuse its discretion in admitting the transcript of an audio tape). Here, the jury had both the audio recording and the transcript to review, minimizing any possibility of unfairness. Officer Duncan testified that he had compared the transcript with the recording and, after he made some corrections, found the transcript to be accurate. Furthermore, the transcripts were not admitted as evidence and therefore not provided to the jury as an exhibit during their deliberations, and the judge gave a limiting instruction advising the jury the call transcripts were not evidence but solely for the jurors' benefit and to help them follow along with the calls. We conclude the trial court did not abuse its discretion in admitting the transcript of the tape.

***c. Sworn Statement Offered by Defendant*.** During Shylandra's cross-examination, the defense sought to impeach her trial testimony with her deposition testimony after she testified at trial she had never indicated that Jackson was acting at the bar "as if he knew his day was coming." Her answer from her deposition's transcript, which stated she answered that Jackson had

acted in that manner, was read back to her at trial. She testified that her deposition transcript was not accurate and that she had not made the statement the transcript stated she had stated. The defense then sought to have pages one through sixteen of her deposition transcript admitted into evidence at trial, arguing the rules of evidence and criminal procedure allowed the admission of the transcript into evidence. The court denied Smith's request, finding that jury had heard the oral impeachment and that admission of the written exhibit would not "make the evidence or the testimony anything different," nor would it "aid or assist the jury or improve the jury's understanding of the testimony at issue."

On appeal, Smith argues the court abused its discretion in not admitting the transcript into evidence. Additionally he argues the court's denial of admission of the transcript violated his federal and state constitutional due process rights.

(1) Constitutional Claim. Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us [on appeal] that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). We do not review issues, even of constitutional magnitude, not presented to the trial court and first raised on appeal. *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982).

Smith did not raise the constitutional claim in the trial court. Thus, the claim was neither presented to nor passed upon by the trial court. Where error is not preserved on an issue there is nothing for an appellate court to review. *State*

v. Manna, 534 N.W.2d 642, 644 (Iowa 1995). We conclude Smith has not properly preserved his constitutional claim for our review and decline to address it.[3]

(2) Evidentiary Claim. In order to be admissible, evidence must be relevant. Iowa R. Evid. 5.401.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Iowa R. Evid. 5.403. Because the balancing analysis under Rule 5.403 is not an exact science, "we give a great deal of leeway to the trial judge who must make this judgment call." *Newell*, 710 N.W.2d at 20-21.

Here, the court essentially found that the deposition transcript was cumulative evidence and a waste of time. We agree. The substance of the deposition transcript impeaching the witness was orally read for the jury and admitted through Shylandra's testimony. The transcript would be merely cumulative of the evidence the jury heard during the defense's cross-examination. Accordingly, we conclude the trial court did not abuse its discretion in denying admission of Shylandra's deposition transcript.

d. Niketa Smith. On direct examination of Niketa Smith, Niketa testified that Jackson received a phone call from Smith on their way to the bar the night of the shooting. He specifically testified that he "could hear the voice [of the caller]

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[3] Additionally, we note that Smith's pro se brief raised the constitutional issue without any argument or citation of authority. *See In re Det. of Garren*, 620 N.W.2d 275, 285 (Iowa 2000) (stating failure to argue or cite authority in support of issue may be deemed a waiver of that issue); Iowa R. App. P. 6.903(2)(*g*)(3) (same). We do not address his constitutional claim on this ground as well.

well enough" that he knew it was Smith. Defense counsel on cross-examination sought to impeach Niketa's testimony by referring to a sworn statement Niketa had given eight days after the murder. In the statement, Niketa said he "couldn't really tell who it was, [he] wasn't listening" concerning the identity of the caller.

On the State's redirect examination of Niketa, the following exchange occurred:

> Q. Do you recall telling Officer Duncan anything about the phone call Tonyeah received in the car on the way to Crystyles, to the investigator on July 13? A. Yes.
> Q. What did you tell the investigator? A. *Um, that Tonyeah told me it was Jeff on the phone. He was talking to Jeff* . . . .
> [Smith's Counsel]: Objection, Your Honor, calls for hearsay. May we approach?

(Emphasis added.) The attorneys and the court then had a discussion off-the-record. Thereafter the court instructed the jury:

> Okay. [Counsel for the State] is going to ask another question. The question that's presently pending you should disregard. The answer that the witness had given to the point of the objection you should also disregard.

The State then continued its redirect:

> Q. [Niketa], did you tell Investigator Duncan on July 13th of 2006 about the phone call Tonyeah Jackson got? A. Yes.
> Q. And did you tell Investigator Duncan that it was Jeff Smith? A. Yes.

Smith argues that Niketa's testimony, that he told the investigating officer that Jackson told him it was Smith on the phone, was hearsay. Smith contends the court abused its discretion and violated Smith's right to confrontation under the U.S. and Iowa Constitutions. We disagree.

(1) Constitutional Claim. Under the Confrontation Clause,[4] a witness's testimony against a defendant is inadmissible unless the witness appears at trial, or if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177, 198 (2004) (emphasis added). The constraints of the Confrontation Clause apply only to "testimonial statements." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 237 (2006). Testimonial statements include those made under circumstances that would lead witnesses to objectively believe the statements might be used at trial. *Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364, 158 L. Ed.2d at 193.

Here, the "testimony" Smith complains of was not admitted into evidence. The court specifically instructed that the prior question and answer Niketa had given to the point of the objection should be disregarded. The State's question was then limited to elicit answers that did not involve hearsay. We conclude no Confrontation Clause issues are implicated in this case. We therefore affirm on this issue.

(2) Evidentiary Claim. Smith next argues that Niketa's stricken answer was hearsay and prejudicial to him such that he should be granted a new trial. We disagree.

Here, the jury was instructed the case was to be decided on the evidence and that evidence did not include anything the jurors had been told to disregard.

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[4] Because Smith has not contended that the Iowa Constitution should be interpreted differently than the Confrontation Clause in the Sixth Amendment to the United States Constitution, we construe the provisions identically. *See State v. Shipley*, 757 N.W.2d 228, 234 (Iowa 2008).

"We presume juries follow the court's instructions," *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010), and there is no evidence indicating the jury did not follow the court's instructions in this case. Our supreme court has "previously found harmless error when the trial court struck erroneously admitted evidence from the record and immediately admonished the jury to disregard the evidence." *Id*. (citing *State v. Johnson*, 183 N.W.2d 194, 198 (Iowa 1971)). Additionally, the same evidence alluded to in Niketa's stricken answer came in without objection in his initial direct examination, wherein Niketa testified that recognized Smith as the caller. *Newell*, 710 N.W.2d at 19. Finally, the evidence against Smith was strong. *Id*. When Niketa's stricken answer is considered in the context of the entire trial and all the properly admitted evidence, we conclude this comment did not prevent Smith from receiving a fair trial with impartial jurors. Accordingly, we affirm on this issue.

***2. Officers' Alleged Failure to Investigate*.**

Smith also contends that the Waterloo Police Department recklessly or intentionally failed to investigate other leads in the case, as well as coerced statements from certain witnesses, in violation of his due process rights. Smith's brief admits that "[e]rror was not per se preserved by a specific objection . . . ." As noted above, issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal, *Eames*, 565 N.W.2d at 32, and we do not review issues, even of constitutional magnitude, not presented to the trial court and first raised on appeal. *Farni*, 325 N.W.2d at 109.

Smith did not raise this claim in the trial court. Thus, the claim was neither presented to nor passed upon by the trial court. Where error is not preserved on

an issue there is nothing for an appellate court to review. *Manna*, 534 N.W.2d at 644. We conclude Smith has not properly preserved this claim for our review and decline to address it.

***3. Recusal*.**[5]

Smith argues the trial judge abused her discretion by not recusing herself when defense counsel moved for her recusal. There is a constitutional right to have a neutral and detached judge. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). A judicial officer is disqualified from acting in a proceeding if the officer has a personal bias. *See State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997). The test is whether a reasonable person would question the judge's impartiality. *Id*. Actual prejudice must be shown before a recusal is necessary. *Id*. Speculation is not sufficient, and "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Mann*, 512 N.W.2d at 532 (citation omitted). The burden of showing grounds for recusal is on the party seeking recusal. *Taylor v. State*, 632

[5] Smith's appellate counsel filed a brief and reply brief. Smith filed a supplemental pro se brief and supplemental pro se reply brief under Iowa Rule of Appellate Procedure 6.901(2). Neither pro se brief contains a certificate of compliance as mandated by Iowa Rule of Appellate Procedure 6.903(4). Smith also filed an additional pro se supplemental brief, raising new issues, after the State filed its brief in response to his and his counsel's initial briefs. As a result, the State does not address issues set forth in sections 3 and 4 of this opinion. *See* Iowa R. App. P. 6.901(2) ("no response by the State will be allowed"). It is noted Smith's additional pro se supplemental brief is in violation of Iowa Rule of Appellate Procedure 6.901(2) and could be stricken on the court's own motion. Iowa R. App. P. 6.901(2)(*a*) ("will not be considered by the court"). Additionally, the brief appears to violate the length limitation set forth in Iowa Rule of Appellate Procedure 6.901(2)(*a*) or (*b*). The brief does not contain a rule 6.903(4) certificate of compliance. Further, the brief raises issues not raised in his initial brief. Issues not raised in Smith's original brief are not preserved for our review. *See State v. Olsen*, 794 N.W.2d 285, 287 n.1 (Iowa 2011). Nevertheless, in the interest of justice, we address the arguments Smith raises in this additional supplemental pro se brief.

N.W.2d 891, 894 (Iowa 2001). This burden is substantial and we will not overturn the trial judge's decision absent an abuse of discretion. *Farni*, 325 N.W.2d at 110.

Smith's pro se brief states that "[e]rror was preserved when defense counsel . . . moved for the [trial judge] to recuse herself due to judicial prejudice, and actual or apparent bias." However, Smith's brief does not make any references to the pertinent parts of the record, in violation of Iowa Rule of Appellate Procedure 6.903(2)(*g*)(3), which requires the appellant's brief contain set forth

> [a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record in accordance with rule 6.904(4).

Similarly, the appendix submitted in this case does not contain copies of Smith's motion to recuse nor the trial court's ruling on the motion, in violation of Iowa Rule of Appellate Procedure 6.905(2)(*b*)(3), requiring "[r]elevant portions of the pleadings, . . . findings, conclusions, and opinion" be included by the appellant in the appendix, and (7), requiring other parts of the record to which the parties wish to direct the court's attention be included by the appellant in the appendix.

"Courts should not be required to search the record to verify the facts and actions taken and are warranted in ignoring uncited contentions, especially in cases where the record is voluminous". *See Tratchel v. Essex Grp., Inc.*, 452 N.W.2d 171, 174 (Iowa 1990). Here, over the course of the case in district court, seven volumes of court records and filings were generated, along with over fifty volumes of transcripts from various hearings and Smith's trial. Based upon

Smith's failure to provide citations to record or information in the appendix for reference to his claimed error, we could decline to consider the issue. *See Channon v. United Parcel Serv.*, *Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Although we are less than pleased with Smith's noncompliance with the relevant rules, which required this court to expend precious court resources looking for information concerning his claimed error, we choose to address the claim on its merits because we discern no abuse on the part of the district court.

The record reveals that on October 15, 2007, Smith's counsel filed a motion seeking the trial judge recuse herself from the case. The motion stated the judge had made a statement "suggesting [the judge] believed that [Smith's counsel] told [Smith] the judge did not give much time, thought, or careful consideration to an important matter before ruling against him in this case." Smith's counsel argued the judge's statement showed animosity towards him and allowed the judge's personal feelings and interests to create "a palpable atmosphere of hostility during the hearing."

A hearing on the motion and other matters was held on October 19, 2007. The court explained that it had previously denied a motion by Smith to reconsider a previous ruling, and Smith's counsel, in his written response as well as oral argument to the court, suggested the court

> had made too short of a ruling, that [the court] had failed to rely on sufficient case law, and that [the court] hadn't given sufficient time between the time of the hearing and the entry of the ruling to fully consider the issues before [the court].

The court thereafter denied Smith's motion to recuse, finding the motion was not based upon anything suggesting there were not facts in the record supporting the

court's statement, nor were the court's statements directed in a personal manner towards Smith or Smith's counsel. Finding no reason for recusal, the court denied Smith's motion.

Here, Smith argues the court's personal bias towards his attorney continued throughout the case. Upon our review of the record in the present case, we find no grounds for recusal that would support a conclusion the trial judge abused her discretion in denying Smith's motion to recuse, and we find Smith's claims of legal error, without supporting authority, insufficient to sustain his burden of establishing prejudice. Smith has presented only speculation or conjecture, and no substantial evidence, that Judge Lekar held any actual, personal bias or prejudice that would have caused her to be unfair or impartial in Smith's case. That some of his motions were overruled is insufficient to assert bias. We conclude Smith has not shown that a reasonable person would question Judge Lekar's impartiality and has not met his substantial burden of proving that grounds for recusal existed. Accordingly, the district court did not abuse its discretion in denying Smith's recusal motion.

***4. Sufficiency of Evidence*.**

Finally, Smith argues the evidence presented at his trial was insufficient to support the jury's guilty verdict because the State failed to establish all elements of first-degree murder and because the State's witnesses' testimony was contradictory. We disagree.

Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). We uphold a finding of guilt if substantial evidence supports the verdict. *State v. Armstrong*,

787 N.W.2d 472, 475 (Iowa Ct. App. 2010). Substantial evidence is evidence from which a rational fact finder could find a defendant guilty beyond a reasonable doubt. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). The evidence must raise at least a fair inference of guilt on each element of the crime. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Evidence merely raising suspicion, speculation, or conjecture is insufficient. *Id*.

Upon our review of the record, we conclude the district court did not err in denying Smith's motion for a judgment of acquittal. Four witnesses testified that they saw Smith shoot Jackson that night. The phone call between Shylandra, Earsery, and Bud contemporaneous with the shooting that night revealed Shylandra's and Bud's immediate observations that Jackson was the shooter. Although Smith argues their testimony and actions were contradictory, the credibility of a witness and the weight of each witness's testimony is the province of the jury. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Where there is conflicting testimony, as there clearly was in this case, the jury is in the best position to judge whom and what to believe. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). "A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity." *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App. 1998).

Here, the four separate witnesses' testimony cannot be said to be so impossible, absurd, and self-contradictory that the testimony should be deemed a

nullity. Consequently, we find there is sufficient evidence in the record which supports the jury's verdict.

***III. Conclusion*.**

For the foregoing reasons, we affirm Smith's conviction and sentence, and preserve his ineffective assistance of counsel claim for possible postconviction relief proceedings.

AFFIRMED.