IN THE COURT OF APPEALS OF IOWA

No. 1-451 / 09-0146
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARZEL JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Arzel Jones appeals from his various convictions for kidnapping, sexual abuse, and assault in two separate cases. **AFFIRMED.**

Patrick C. Peters of Payer, Hunziker, Rhodes & Peters, L.L.P., Ames, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Jennifer Miller, County Attorney, and Suzanne Lampkin, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Arzel Jones appeals from his various convictions for kidnapping, sexual abuse, and assault in two separate cases. He raises several issues on appeal: He contends (1) the court's written entry of the verdict was improper; (2) there was insufficient evidence to support a finding that a fork is a dangerous weapon; (3) the State failed to comply with discovery; (4) joinder of the cases was an abuse of discretion; (5) denial of his attorney's motion to withdraw was in error; (6) there was insufficient evidence to show he had specific intent to support his conviction of assault with intent to inflict serious injury; (7) he did not knowingly and voluntarily waive his right to a jury trial; and (8) his trial counsel was ineffective in several respects.

I. Background Facts and Proceedings. In the fall of 2007, Jones met M.P. at the bar where she worked. They began a sexual relationship shortly after meeting and saw each other on a daily basis throughout the fall.

On November 30, 2007, M.P. arrived at Jones's residence to look at fire damage he claimed was on his kitchen wall. M.P. observed Jones rambling incoherently and pacing back and forth as he accused her of being unfaithful. After approximately one hour, Jones punched M.P. in the chest two or three times and slapped her across the face. M.P. was frightened and did not try to leave.

At approximately 9:00 p.m., at the request of a friend of M.P., police officers arrived at Jones's apartment to conduct a "welfare check." While the police were at the door, Jones laid on top of M.P. with his hand over her mouth to

prevent her from responding. The police went outside and looked at the windows and returned to knock on the door a second time. Jones pulled M.P. into his bedroom by her hair and again covered her mouth with his hand to prevent her from responding. Jones then forced her to call the police and her family to falsely report she was in Ames with a friend. Jones also told M.P. to call her employer and say she would not be at work because her grandmother was sick.

Because M.P. did not want her family to see the physical reminders of the abuse, she elected to stay with Jones for the weekend until she had to pick up her son on the afternoon of Monday, December 3, 2007. M.P. believed once the attack was over, Jones was sorry for what he'd done. He drove her to Walmart to get an ice pack to reduce the swelling of her injuries. M.P. engaged in consensual sexual activities with Jones during the weekend.

M.P. went to work on the night of December 3, a shift that extended into the early morning hours of December 4. At approximately 1:00 a.m., Jones came into the bar and had several drinks while staring at M.P. Jones purchased a six-pack of beer and left at 2:00 a.m., closing time. M.P. left work fearful Jones was waiting for her because he did not have a vehicle and his apartment was approximately a mile away. When she got in her car and started it, Jones jumped into the passenger seat and ordered her to drive to his apartment. Along the way, he told her to stop at a Kum & Go convenience store. When she parked the car, Jones took the keys from the ignition and went into the store. M.P. stayed in the car. Jones returned and ordered M.P. to change seats with him so

he could drive. He did not take M.P. home as she requested, instead driving her to his apartment.

Upon arriving at the apartment, Jones locked the door and told M.P. to undress. Jones was again pacing back and forth while mumbling and calling her names. Jones forced her to lie down, took pictures of her crotch, and forced one finger into her anus and one into her vagina. Jones kicked M.P. in the face while wearing boots, causing bleeding and swelling to her lip. Jones dragged M.P. to the bathroom by her hair and told her to rinse her mouth with rubbing alcohol. Then he held a metal fork to her neck and forced her to perform oral sex on him, telling her to do it like her life depended on it. The forced oral sex continued for several hours with Jones stopping at times to pace and smoke a cigarette. At one point M.P. told him she could not do it anymore and tried to head for the door, but Jones grabbed her by the hair and pulled her back. Eventually, Jones choked M.P. and then forced her to have intercourse with him against her will.

Jones drove M.P. to several medical clinics and the emergency room due to her swollen and bruised jaw. When he dropped her off at home on the afternoon of December 4, 2007, M.P. told her parents about the assault and sexual abuse, and they contacted police.

Two trial informations were filed on December 13, 2007. One charged Jones with third-degree kidnapping and domestic abuse assault causing bodily injury for the events occurring on November 30, 2007. The other charged Jones with first-degree kidnapping, attempt to commit murder, two counts of second-

degree sexual abuse, first-degree harassment, and domestic abuse assault causing bodily injury for the events occurring on December 4, 2007.

A jury trial was set for January 23, 2008. Jones waived his right to a jury trial on January 9, and on January 17, the State moved to continue the trial to allow additional time for discovery. After a hearing on January 18, the court found the waiver of jury trial valid, denied the request to continue and a request to amend the minutes of testimony, and ordered the two cases to be tried together.

A bench trial was held from January 23 through January 30, 2008. Just before trial began, one of Jones's attorneys informed the court Jones had become hostile with him when the proceedings did not start at exactly 9:00 a.m. as scheduled, made various derogatory statements regarding counsel's ethnicity, and threatened him. The attorney expressed some reservations about being able to adequately represent Jones in light of the confrontation, but Jones, when asked by the court, stated he had no problem with the attorneys continuing to represent him. After the court voiced its confidence in his trial counsel's ability to proceed and fully represent Jones, trial commenced.

On March 7, 2008, the district court entered its verdict finding Jones guilty as charged with regard to the crimes relating to the events of November 30, 2007. The court also found Jones not guilty of first-degree kidnapping and harassment in the first degree, and guilty of assault with intent to inflict serious injury, second-degree sexual abuse, third-degree sexual abuse, and domestic abuse assault causing bodily injury with regard to the crimes stemming from the

morning of December 4, 2007. The court later amended the convictions to domestic abuse assault causing bodily injury to assault causing bodily injury, finding the State failed to prove an "intimate relationship."

New counsel represented Jones post-trial and filed motions for arrest of judgment and new trial. Following a hearing, the court denied the motions on all nine grounds raised. Jones was sentenced to a ten-year term of imprisonment for third-degree kidnapping and a one-year term of confinement for assault causing bodily injury in the first case. The sentences were ordered to run concurrently. In the second case, Jones was sentenced to two-years of imprisonment for assault with intent to cause serious injury, twenty-five years of imprisonment for second-degree sexual abuse, ten-years of imprisonment for third-degree sexual abuse, and one-year confinement for assault causing bodily injury. The sentences were ordered to run concurrently. The sentences in the two cases were ordered to be served consecutively. Jones filed a timely notice of appeal.

II. Written Entry of the Verdict. Jones first contends the court erred in issuing a written verdict rather than rendering the verdict in open court. Iowa Rule of Criminal Procedure 2.17(2) states, "In a case tried without a jury the court shall find the facts specially and on the record, separately stating its conclusions of law and rendering an appropriate verdict." The question before us turns on the meaning of "on the record." Jones argues it requires the court to read the verdict out loud in open court while the State argues a written verdict filed with the clerk of court is sufficient. This is an issue of first impression in this state.

Jones's argument is premised on our supreme court's ruling in *State v. Lidell*, 672 N.W.2d 805 (Iowa 2003). In *Lidell*, the supreme court interpreted rule 2.17(1) (requiring waiver of a jury trial to be "on the record") to require "some in-court colloquy or personal contact between the court and the defendant." *Lidell*, 672 N.W.2d at 812. Jones argues we should apply this same interpretation to rule 2.17(2) to require the district court to read its verdict and findings aloud in open court. However, rule 2.17(1) has a different history than rule 2.17(2). Notably, rule 2.17(1) formerly required a defendant's waiver of jury trial to take place "in a reported proceeding in open court." 1977 Iowa Acts ch. 153, § 44; *Lidell*, 672 N.W.2d at 813. The rule was then amended to require waiver be made "on the record and in writing." *Lidell*, 672 N.W.2d at 812. The court in *Lidell* took this legislative history into account in determining waiver of a jury trial must take place in open court. *Id*.

After examining the rule and case law Jones relies upon, we conclude an in-court rendering of the verdict is not required. Rule 2.17(2) does not have an analogous history requiring a trial court's verdict to be given in a reported proceeding in open court. Furthermore, we agree with the State's argument the type of contact required by the court to ensure a defendant has knowingly and voluntarily waived a constitutional right is different than that of a defendant being told the court's verdict after the decision has already been made. Because the district court did not err in entering a written verdict, we affirm.

III. Dangerous Weapon. Jones next contends there is insufficient evidence to support the court's finding the fork used in this case was a

dangerous weapon. He argues there is no evidence or statement in the court's findings explaining how the fork is a dangerous weapon.

We review claims of insufficient evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.*

In order to be convicted of second-degree sexual abuse, the State had to prove that during the sexual abuse, Jones displayed a dangerous weapon in a threatening manner. *See* Iowa Code § 709.3(1) (2007). A dangerous weapon is defined as

> any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed, except a bow and arrow when possessed and used for hunting or any other lawful purpose. *Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon.* Dangerous weapons include but are not limited to any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, knife having a blade exceeding five inches in length, or any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.

Id. § 702.7. Because a fork is neither listed as a dangerous weapon per se, nor is it designed primarily for use inflicting death or injury, we must determine whether there is sufficient evidence to show the fork was used in a manner to

indicate Jones intended to inflict death or serious injury upon M.P., and whether the fork was capable of causing death.

Viewing the evidence in the light most favorable to the verdict, we find sufficient evidence supports the finding the fork was a dangerous weapon as defined in section 702.7. Although Jones complains no specific evidence was introduced at trial indicating a fork, or "the particular fork used in this case," is capable of causing death, we may consider practical experience in making this determination. *See State v. Ortiz*, 789 N.W.2d 761, 767 (Iowa 2010) ("Practical experience tells us that a box cutter or utility knife when so intended is capable of inflicting death."). A fork, used to stab through food like steak, is capable of causing death, especially when causing an injury in a vulnerable place like the neck. Furthermore, courts in other jurisdictions have found that while a fork is not a dangerous weapon per se, it may be used as a dangerous or deadly weapon. *See People v. Moran*, 109 Cal. Rptr. 287, 290-91 (Cal. Ct. App. 1973) (holding a three-prong metal fork is a deadly weapon); *State v. Manning*, 15 So.2d 1204, 1211 (La. Ct. App.) ("A fork held up to S.M.'s neck in the instant case arguably constitutes a dangerous weapon."); *State v. Kiluk*, 410 A.2d 648, 651 (N.H. 1980) (holding the striking of a person in the eye with a fork clearly identifies the fork as a deadly weapon); *State v. Cleveland*, No. 03C01-9503-CR-00089 (Tn. Ct. App. 1996) (holding a fork the was "clearly" a dangerous weapon); *Pesina v. State*, 949 S.W.2d 374, 378-79 (Tex. Crim. App. 1997) ("Dr. Bux was also of the opinion that the meat fork found in the kitchen sink was capable of having caused the single stab wound to the neck and that the fork would qualify

as a deadly weapon in the manner of its use or intended use if the fork had been used to produce the injury sustained by the victim."); *but see C.A.C. v. State*, 771 So.2d 1261, 1262 (Fla. Dist. Ct. App. 2000) (holding a fork is not likely to cause death or great bodily harm when "used in the ordinary manner contemplated by its design").

Jones also used the fork in a manner indicating he intended to inflict serious injury or death to M.P. He held the fork to her neck pressing the tines to her skin as he ordered her to perform oral sex like her life depended on it. Because there is sufficient evidence the fork was a dangerous weapon, we affirm Jones's conviction for second-degree sexual abuse.

IV. Discovery. Jones also contends the State failed to comply with discovery because it did not provide allegedly exculpatory evidence. Specifically, Jones complains the State failed to provide him with a copy or transcript of the 911 call made on November 30, 2007. He also asserts the discovery of the requested evidence after trial qualifies as newly-discovered evidence, entitling him to a new trial under Iowa Rule of Evidence 2.24(2)(*b*)(8).

In the discovery requests propounded to the State in January 2008, Jones sought any relevant or exculpatory evidence related to the case. In a deposition of Detective Thomas Watson on January 15, 2008, he referred to a 911 call made on November 30, 2007, which led the police to do the welfare check on Jones's residence searching for M.P. Jones's trial attorney then asked if the 911 call transcript and the police call log relating to it existed, and if so, requested the

State produce them. The prosecuting attorney stated she would check, but nothing was produced before trial eight days later.

After trial, Jones's new attorney subpoenaed all dispatch recordings and logs during the relevant times and was given a transcript of the 911 call. In the transcript of the November 30, 2007 call, the caller, in response to a question by the dispatcher, states: "No they're inside, but I guess a couple of days ago, whatever what happened was she ended up uh–he ended up choking her and she got a cut on her neck." Jones argues this raises questions as to who caused the injuries M.P. claims Jones inflicted on November 30 or December 4 because M.P. testified he never assaulted her prior to those dates.

At the hearing on his combined motion in arrest of judgment and motion for new trial, Jones conceded the State did not have prior possession of the 911 tape and had not violated the pretrial discovery order. Accordingly, he cannot argue prosecutorial misconduct on appeal. *See State v. Rutledge*, 600 N.W.2d 234, 325 (Iowa 1999).

Jones also argues the transcript is newly-discovered evidence, which warrants a new trial. Our review of the district court's ruling denying a motion for new trial based on newly-discovered evidence is for an abuse of discretion. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). Our supreme court has set forth the test for newly-discovered evidence as such:

> With newly discovered evidence claims, the claimant must establish: (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial.

Grissom v. State, 572 N.W.2d 183, 184 (Iowa 1997).

Even assuming the transcript of the 911 call was discovered after the verdict, could not have been discovered earlier with due diligence, and was material to the case, Jones cannot show the evidence would have changed the trial result. As the district court found, it is unclear how the evidence would have been beneficial to Jones, and it may have actually damaged his case. Although Jones is not referred to by name during the call, the caller describes his apartment as the location where M.P. was being beaten at the time the call took place. The caller further states the same couple had been involved in an altercation a couple days before where "he ended up choking her and she got a cut on her neck." Because the evidence probably would not have changed the outcome of the case, it does not fall within the category of evidence that warrants a new trial.

V. Joinder. Jones contends the district court erred in consolidating the two cases for trial. We review this claims for an abuse of discretion. *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007).

Pursuant to Iowa Rule of Criminal Procedure 2.6(1):

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Where occurrences are "products of a single or continuing motive," our supreme court has held they are part of a "common scheme or plan" under rule 2.6(1).

Elston, 735 N.W.2d at 198. To ascertain whether a "common scheme or plan" exists, our courts have found it helpful to considers factors such as "intent, modus operandi, and the temporal and geographic proximity of the crimes." *Id.*

Here, the two occurrences from which the charges stem were close in proximity, occurring over a five-day period with only a few hours between December 3 and the early morning hours of December 4. The same victim was involved in all of the crimes, and the modus operandi was similar. Because the events were part of the same common scheme or plan, they could be charged under the same trial information under rule 2.6(1).

Where, as here, the State elects to file two separate informations on charges that could have been combined, the court may order the charges consolidated for trial. *State v. Trudo*, 253 N.W.2d 101, 104 (Iowa 1977). In order to meet the burden of showing the court abused its discretion in refusing to sever the charges, Jones must show prejudice from the joinder. *See Elston*, 735 N.W.2d at 199. We conclude he has not carried his burden. In a bench trial, the district court is in a better position by virtue of training and experience to compartmentalize the evidence regarding various charges and guard against the prejudice a severance seeks to prevent, and therefore prejudice is less likely than in a jury trial. *State v. Greier*, 484 N.W.2d 167, 172-73 (Iowa 1992). Jones is unable to articulate how he was prejudiced. Accordingly, we affirm.

VI. Motion to Withdraw. Jones contends the court erred in denying his trial attorney's motion to withdraw. He argues this error violated his right to effective assistance of counsel. Our review of motions to discharge counsel is

for an abuse of discretion. *State v. Martin*, 608 N.W.2d 445, 449 (Iowa 2000). Where there is an underlying constitutional issue, we review de novo to the extent of determining whether an abuse of discretion occurred. *State v. Thompson*, 597 N.W.2d 779, 782 (Iowa 1999).

We first note no motion to withdraw was made. On the morning of trial, Jones's counsel expressed concerns about his ability to represent Jones following an encounter wherein Jones made a number of disparaging remarks based on his counsel's ethnicity and stated if he wasn't handcuffed, he would do something, which his counsel perceived as a threat. Jones informed the court he wanted to continue to trial with his counsel. Counsel then stated:

> Your honor, I understand the need for this case to go on, but I just need to embellish the record and advise the Court that it is this attorney I am having a very difficult time maintaining my composure in this case based on the—I think Mr. Jones has denied basically, but based on the personal attacks to me it's very hard for me to remain composed and do my best job that I can for this individual and to—I am quite upset the comments that he made and I think the Court should be aware that in the state of mind I'm in. And I think that puts me in a very difficult position. But, I understand Mr. Jones's dilemma and his position and that he wants the show to go on.

The court then voiced its confidence in counsel's ability to do his best job for Jones.

After trial, counsel did make a motion to withdraw, citing the fact the attorney-client relationship was "quite strained." Jones continued to request representation by the same attorney, even though he felt his counsel had joined with the State in "railroading" him. The court told Jones,

> [Y]ou can't on one hand be challenging these people and accusing them of inappropriate conduct and expect them to sit here and

> represent you, to listen to what you have to say. They did a remarkable job at trial doing that under the circumstances. They did a good job.

The court then found the attorney-client relationship had broken down and granted the motion to withdraw.

Jones alleges the court abused its discretion in denying what he characterizes as a motion to withdraw prior to trial and in denying the motion to for new trial on that basis. However, a defendant must demonstrate sufficient cause to warrant the appointment of substitute counsel. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). Such justifiable dissatisfaction with appointed counsel includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.* Further, the court must balance "the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *Id.*

We find no abuse of discretion. Counsel raised the conflict with the defendant just prior to the scheduled start of trial. Jones told the court he wished to proceed with his appointed counsel and indicated he had no concerns about their ability to represent them. Taking Jones's stated preference to continue with counsel and the public's interest in prompt administration of justice into account, we find the district court did not abuse its discretion in allowing counsel to continue to represent Jones.

VII. Intent to Commit Serious Injury. Jones contends there was insufficient evidence to support the court's finding he had the intent to commit a serious injury with regard to his conviction of assault with intent to commit a

serious injury. A serious injury is defined as bodily injury that does any of the following:

> (1) Creates a substantial risk of death.
> (2) Causes serious permanent disfigurement.
> (3) Causes protracted loss or impairment of the function of any bodily member or organ.

Iowa Code § 702.18(1)(b).

Intent, being a mental condition, must ordinarily be inferred from external circumstances. *State v. Clarke*, 475 N.W.2d 193, 197 (Iowa 1991). Because proving a mental state like intent which is seldom susceptible to proof by direct evidence, circumstantial evidence is particularly valuable. *Id.* Such evidence must "raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture." *Id.*

Jones was convicted of assault with intent to commit serious injury as a lesser-included offense of attempted murder for his act of kicking M.P. in the face on December 4, 2007, while wearing his work boots. In finding Jones intended to commit a serious injury, the court held:

> It is foreseeable that if a blow to the jaw is administered with sufficient force it could cause a fracture of the jaw, loss of teeth and other injuries and damages to the mouth and jaw which would require surgical repair. It is not uncommon for a blow to the face to require such medical intervention. In this case, defendant, without provocation or warning of any kind whatsoever, kicked [M.P.] in the face with sufficient force that he caused injuries to her mouth which were painful and required medical attention.

Jones disputes this evidence proves he intended to commit "a protracted loss or impairment of the function of any bodily member or organ" as required for a finding of serious injury. He argues the natural consequence of his action was

simply to cause injuries to M.P.'s mouth, which were painful and required medical attention.

As the district court notes, kicking someone in the face while wearing heavy work boots may fracture a jaw, knock out teeth, or cause damage requiring surgical repair. These types of injuries would be classified as a protracted loss or impairment of the function to a bodily member. Although M.P.'s actual injury was a laceration to the mouth, the court could infer Jones intended the natural consequence of his actions when he kicked M.P. in the face. Accordingly, the evidence is sufficient to support Jones's conviction for assault with intent to cause serious injury.

VIII. Waiver of Jury Trial. Jones contends he did not knowingly and voluntarily waive his right to a jury trial. He concedes he did not raise the issue until his motion for new trial and, accordingly, has not preserved this issue for our review. We address this claim under an ineffective-assistance-of-counsel rubric in the next section.

IX. Ineffective Assistance of Trial Counsel. Finally, Jones contends his trial and postconviction counsel were ineffective in several regards: (1) in failing to be present at the entry of the verdict; (2) in failing to preserve the issue of rendering the verdict in open court and the knowing and voluntary nature of his jury waiver; and (3) in failing to adequately advise him of his rights concerning the waiver of a jury trial.

We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Ordinarily, we preserve

ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner,* 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978)).

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark,* 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State,* 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong.

Id. In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

We reject Jones's claims regarding the reading of his verdict in open court, having already rejected his claim on its merits. Nor do we find counsel needed to be present to safeguard any rights at the entry of the verdict. Because counsel did not fail to perform an essential duty, we cannot find counsel ineffective.

We then consider Jones's claims his counsel erred in failing to preserve the issue of the knowing and voluntary waiver of his right to jury trial and counsels' failure to properly advise him on his right to a jury trial. When waiving a right to jury trial, the court must ascertain whether the defendant's waiver is knowing, voluntary, and intelligent. *Lidell*, 672 N.W.2d at 813. To ensure the defendant knows the difference between a bench and jury trial, the court should inform the defendant of the following in an in-court colloquy:

> 1. Twelve members of the community compose a jury;
> 2. The defendant may take part in jury selection;
> 3. Jury verdicts must be unanimous;
> 4. The court alone decides guilt or innocence if the defendant waives a jury trial; and
> 5. Neither the court nor the prosecution will reward the defendant for waiving a jury trial.

Id. At 813-14. However, these five subjects of inquiry are not "black-letter rules" nor a "checklist" by which all jury-trial waivers must be strictly judged. *Id.* at 814. Substantial compliance is acceptable. *Id.*

Here, Jones signed a written waiver in which he affirmed he had, among other things, been advised that he had a right to be tried by a twelve-person jury, the jury's verdict would have to be unanimous, and that waiving a jury meant his case would be decided solely by a judge. Jones complains the failure to affirm he knew of his right to participate in jury selection and knew he would not be rewarded for waiving the jury trial render his waiver involuntary and unknowing.

An in-court colloquy was also conducted, wherein Jones was informed of his right to have a twelve-person jury, which he participated in selecting, decide his fate, and that the verdict would have to be unanimous. He was also told that if he waived a jury trial, one judge would determine the outcome of his case.

When reviewing the record as a whole, we find the written and in-court colloquy, when taken together, were sufficient to inform Jones as to the rights he was waiving. Therefore, his waiver was knowing, voluntary, and intelligent. Because his counsel did not err in informing him of his right to a jury trial or in preserving error on the issue of his waiver of a jury trial, we affirm.

AFFIRMED.