

IN THE COURT OF APPEALS OF IOWA

No. 3-570 / 10-1337
Filed July 10, 2013

MICHAEL RAY ROBINSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

A postconviction relief applicant contends that he was denied effective assistance of counsel when his attorneys did not object to the composition of the jury pool. **AFFIRMED.**

James P. Moriarty of James P. Moriarty, P.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas H. Miller, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Susan Nehring, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Michael Ray Robinson appeals the denial of his claim that trial and postconviction relief counsel “were ineffective in not objecting to the total absence of African Americans or any other minority in the jury panel as a whole or in the sitting jury.”

I. Background Proceedings

In 1992, a Linn County jury found Robinson guilty of one count of first-degree kidnapping and two counts of second-degree robbery. On direct appeal, this court affirmed his judgment and sentence, and preserved a claim that his trial attorney was ineffective in failing to argue black persons were systematically excluded from the jury pool. *State v. Robinson*, No. 92-1145 (Iowa Ct. App. Oct. 5, 1993).

Robinson filed a postconviction relief application raising this ineffective-assistance-of-counsel claim. The district court dismissed the application without an evidentiary hearing. On appeal, this court reversed and remanded “for the purpose of developing a more complete record as to whether trial and postconviction relief counsel were ineffective in failing to raise the issue of systematic exclusion of blacks from the jury pool.” *Robinson v. State*, No. 98-1805, 2000 WL 145043, at *2 (Iowa Ct. App. Feb. 9, 2000).

Following remand, the court again dismissed the application without an evidentiary hearing. Robinson again appealed, and we again reversed and remanded for an evidentiary hearing. *Robinson v. State*, No. 03-1058, 2004 WL 2386828, at *2 (Iowa Ct. App. Oct. 27, 2004).

The district court ultimately held an evidentiary hearing at which the only claim considered was the composition of the jury pool.¹ Following the hearing, the district court denied the application. This appeal followed.

II. Composition of Jury Panel

As a preliminary matter, Robinson concedes he must prove that counsel failed to perform an essential duty and prejudice resulted from this failure. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984). He contends

because portions of the trial transcript were lost in a natural disaster, [he] does not have full access to the files and the actual testimony and rulings to permit him or counsel a full and fair opportunity to analyze and prove to the required preponderance standard in *Strickland* the prejudice that he maintains resulted from the failure of counsel to perform an essential duty.

We find it unnecessary to address the prejudice prong of Robinson’s claim; our focus is on the breach prong. On that prong, the loss of portions of the trial transcript does not impede our review, which is de novo. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) (setting forth the standard of review).

The Sixth Amendment “entitles a criminal defendant to a jury panel designed to represent a fair cross-section of the community.” *State v. Jones*, 490 N.W.2d 787, 792 (Iowa 1992). “A systematic exclusion of ‘distinct’ segments of the community violates the constitutional requirement.” *Id.* To establish a prima facie violation of the Sixth Amendment, the criminal defendant must show:

¹ Robinson also contends he “should not have been convicted of kidnapping in the first degree as the State did not produce proof beyond a reasonable doubt of the element of removal or confinement beyond that incidental to another crime.” He concedes he “did not present any evidence on this point during the” evidentiary hearing on his postconviction relief application and the district court did “not raise or discuss the matter.” Accordingly, error was not preserved. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). The State also points out that “[t]his issue was addressed on the merits on direct appeal from the conviction, where the issue was decided in the State’s favor.”

(1) [T]hat the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. Robinson, who testified he was black, established he was a member of a distinctive group. He did not establish the second or third element.

With respect to the second element, “[t]here is no requirement that the distinctive group or class be represented in exact proportions to the general population.” *Id.* at 792–93. “Some deviation is to be expected” and only substantial deviations will amount to a violation of the fair cross-section requirement. *Id.* at 793. In assessing what constitutes a substantial deviation, the court examines the “absolute disparity,” defined as the difference between the percentage of the distinct group in the population and the percentage of that group in the jury panel. *Id.*; see also *State v. Watkins*, 494 N.W.2d 438, 440 (Iowa Ct. App. 1992).²

To support this element, Robinson offered an exhibit summarizing 1990 census data for Linn County, Iowa. The data revealed that ninety-seven percent of the population was white, two percent was black, and one percent was “other.” When Robinson was asked if he had any independent information that would vary from these statistics, he said “No.” He later reiterated, “I don’t have no more information.” He further testified there were forty-nine or fifty people in the jury

² In *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the United States Supreme Court noted that this measurement “can be misleading when . . . members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service.” (quotation marks and citation omitted). The Court found it unnecessary to reach the question of whether the absolute-disparity standard should be adopted and whether a disparity standard exceeding ten percent should also be adopted. *Berghuis*, 559 U.S. at 330 n.4.

pool, and all were white. These statistics lead to an absolute disparity of two percent, well under the percentages cited as non problematic. See *Jones*, 490 N.W.2d at 793.

We turn to the third prong, which requires a showing of systematic exclusion. *State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997). Robinson was asked if he had any knowledge of anything being done by the Linn County Clerk of Court that would have excluded black jurors from appearing on the date of his trial. He answered that he thought the clerk “only used two source lists” rather than three. One of Robinson’s postconviction attorneys refuted this testimony, stating that she spoke to personnel in the Linn County Clerk of Court’s office and found that they used three lists from which to draw names for the jury pool, as then required by statute. When Robinson was asked if there was anything else on which he was relying to support this element, he said, “No There’s nothing else.”

We conclude Robinson’s attorneys did not breach an essential duty in failing to challenge the composition of the jury panel on the ground that it failed to represent a fair cross-section of the community. Accordingly, Robinson’s ineffective-assistance-of-counsel claim fails, and we affirm the district court’s denial of Robinson’s postconviction relief application.

AFFIRMED.