

IN THE COURT OF APPEALS OF IOWA

No. 7-025 / 06-0180
Filed March 28, 2007

JAMES FULLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

James Fuller appeals from the district court's denial of his petition for
postconviction relief. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Harold Denton, County Attorney, and Todd Tripp, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

James Fuller was convicted and sentenced for first-degree burglary in violation of Iowa Code sections 713.1 and 713.3(1)(b) (1999), and assault in violation of sections 708.4(1) and (2). His conviction was affirmed by this court. *State v. Fuller*, No. 00-1872 (Iowa Ct. App. Jan. 28, 2002). He then filed a petition for postconviction relief, which led to this appeal. Fuller's petition asserted his trial attorney was ineffective in failing to object to testimony concerning an out-of-court identification at trial. The district court denied the claim. On appeal Fuller contends his postconviction counsel was ineffective in not raising a claim that counsel on direct appeal was ineffective in failing to raise a claim that trial counsel was ineffective in not objecting to evidence concerning a drug turf war. The State contends this issue, having not been raised, litigated, and decided in the district court, was not preserved for appellate review. Fuller claims it did not need to be preserved because it is a claim of ineffective assistance of counsel.

Ineffective assistance of counsel in a prior proceeding may provide sufficient reason for not raising an ineffective-assistance claim earlier. See *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). However, each claim prior counsel was ineffective still must demonstrate counsel failed in an essential duty and prejudice resulted. See *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006). To prove prejudice, the defendant "must show that the outcome of the trial would have been different." *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). "[W]e need not determine whether counsel's performance is deficient before examining the prejudice element." *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). "If

sufficient prejudice is not shown, we need not address whether counsel breached an essential duty.” *Id.*

Fuller contends trial counsel was ineffective in not objecting to admission of testimony from a deposition that violated the court’s ruling on his motion in limine. The deposition testimony was redacted by defense counsel and the prosecution in order to comply with the motion in limine ruling. The passing reference to drugs cited by Fuller is insufficient to demonstrate a clear violation of the ruling or an effect on the fact finder that likely would have changed the outcome of the trial. We find no prejudice from this claim of error. Because Fuller has not demonstrated prejudice from trial counsel’s performance, appellate and postconviction counsel cannot be ineffective for not raising this claim that trial counsel was ineffective.

We therefore affirm the denial of Fuller’s postconviction relief application.

AFFIRMED.