STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2225

Patrick Bernard, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 25, 2008
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-97-043678

Patrick Bernard, MCF-Rush City, 7600 525th Street, Rush City, Minnesota 55069 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, arguing that (1) he was denied effective assistance of counsel; (2) he did not receive a

fair trial; (3) his due-process rights were violated because he was not allowed to be present at all critical stages of the trial; and (4) the district court erred by not hearing his motion to remove or recuse the judge. We affirm.

D E C I S I O N

Ineffective Assistance of Counsel

Appellant Patrick Bernard first argues that the district court abused its discretion in denying his postconviction petition because he was denied effective assistance of counsel. A district court must hold an evidentiary hearing on a petition for postconviction relief, unless the "files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2006). The petitioner bears the burden of establishing facts that warrant relief. *Id.*, subd. 3 (2006). To meet this burden, allegations must be more than argumentative assertions. *Schleicher v. State*, 718 N.W.2d 440, 444 (Minn. 2006). This court examines only whether the postconviction court's findings are supported by sufficient evidence. *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). Legal issues, however, are reviewed de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). We review a summary denial of a postconviction petition for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

Trial Counsel

Appellant argues that his trial counsel failed to protect his constitutional rights and failed to object to hearsay testimony and evidence. Initially, we note that appellant knew or should have known of the ineffective-assistance-of-trial-counsel claim at the time of

the direct appeal and his claim can be decided based on the district court record. Claims raised on direct appeal, in a previous postconviction petition, or that were known or should have been known at the time of the direct appeal are procedurally barred from consideration in subsequent petitions for postconviction relief. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). There are, however, two exceptions to the *Knaffla* rule: a claim so novel that the legal basis for it was unavailable on direct appeal, or fairness requires review and the petitioner did not deliberately and inexcusably fail to raise the claim on direct appeal. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). The *Knaffla* rule applies to an ineffective-assistance-of-counsel claim unless the claim cannot be decided on the district court record because it requires additional evidence. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). Because appellant's ineffective-assistance argument could have been decided based on the existing record, *Knaffla* bars appellant's claim.

But even if *Knaffla* did not apply, appellant's claim fails. In order to succeed, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). *See State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003) (holding that representation is reasonable when counsel does not object to properly admitted evidence).

Appellant argues that trial counsel failed to protect his constitutional right to confront and cross-examine the victim of the attempted homicide. But the victim was never called as a witness. Appellant also argues that counsel failed to object to hearsay evidence of unfairly prejudicial photographs of him and one of the victims. The photographs were not hearsay. *State v. Bauer*, 598 N.W.2d 352, 362 (Minn. 1999) (endorsing visual aid used for illustrative purposes). And this court examined the unfair-prejudice issue on direct appeal. Finally, appellant argues that counsel failed to object to improper jury instructions and failed to require the state to prove every element of the crimes that he was charged. Because the jury instructions were proper and the state proved every element of the crimes, trial counsel could not object on these grounds. Because appellant failed to demonstrate that trial counsel's representation fell below an objective standard of reasonableness. We do not need to examine the second prong of the *Strickland* test. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 (stating that there is no reason for a court deciding an ineffective-assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one). Therefore the district court did not abuse its discretion in denying appellant's petition.

Appellate Counsel

Appellant also argues that appellate counsel was ineffective by failing to raise an ineffective-assistance-of-trial-counsel claim. To succeed in this ineffective-assistance-of-appellate-counsel claim appellate must first show that trial counsel was ineffective. *Zenanko v. State*, 688 N.W.2d 861, 865 (Minn. 2004). Because appellant failed to prove that trial counsel was ineffective, his ineffective-assistance-of-appellate-counsel claim

fails. The district court did not abuse its discretion in denying appellant's postconviction petition.

Right to a Fair Trial

Appellant next argues that he did not receive a fair trial because the district court (1) failed to secure his right to confrontation; (2) erroneously allowed hearsay testimony and evidence; (3) improperly instructed the jury; and (4) failed to require the state to prove every element of the crimes. These are the same issues that were the basis for appellant's ineffective-assistance-of-counsel claim and have been determined to be meritless. The postconviction court properly denied appellant's petition because he received a fair trial.

Due-Process Rights

Appellant also argues that his due-process rights were violated because the district court had improper communications with the deliberating jury outside of his presence. A criminal defendant has a due-process "right to be present at all critical stages of trial." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). "Responding to a deliberating jury's question is a [critical] stage of the trial." *State v. Sessions*, 621 N.W.2d 751, 755, 757 (Minn. 2001) (holding that the district court erred when it communicated with a jury outside of open court; without the appellant's knowledge, consent, or presence; and without the presence of the appellant's counsel and the prosecutor). A defendant may waive his right to be present at all critical stages of trial. *Id.* at 756. And this waiver does not have to be explicit. *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993) ("[T]he fact that a personal waiver does not appear of record on appeal does not mean that there was

no waiver."). Furthermore, "a detailed on-the-record colloquy between the defendant and the [district] court" is not required to show a valid waiver. *State v. Martin*, 723 N.W.2d 613, 620 (Minn. 2006) (quotation omitted). Appellant bears the burden of showing that his absence was involuntary. *State v. Cassidy*, 567 N.W.2d 707, 710 (Minn. 1997)

The record shows that appellant waived his right to be present. The district court discussed appellant's right to be present when any questions came back from the jury. Appellant decided that "it would be better" if he returned to the jail rather than wait and be present for any jury questions. Additionally, the jury's questions and the district court's answers were filed with the court and placed in the court file. Therefore, appellant knew or should have known of the communications at the time of his direct appeal and his claim is *Knaffla* barred. *See Cooper v. State*, 745 N.W.2d 188, 192 (Minn. 2008) (concluding that any claims stemming from communications between the jury and the district court were known or should have been known at the time of direct appeal because a record of the communications was part of the record).

Finally, even if appellant did not waive his right to be present and his claim is not *Knaffla* barred, appellant failed to demonstrate that the district court committed reversible error. Communication between a district court and a jury on a substantive matter without the defendant's presence or consent may be reversible error. *Martin*, 723 N.W.2d at 619. Reversal is not automatic, however, and a new trial will be ordered only upon a showing of prejudice by the appellant. *Leake v. State*, 737 N.W.2d 531, 537 (Minn. 2007); *State v. Erickson*, 597 N.W.2d 897, 901 (Minn. 1999)). "Prejudice will be presumed upon a showing . . . of private communications or contact or other circumstances suggesting

direct or indirect improper influence or jury tampering, such as pervasive, unfavorable publicity." *Erickson*, 597 N.W.2d at 902 (quotation omitted). Appellant fails to show that the communications created any improper influence or prejudice. The district court neither entered the jury room nor contacted the jury personally, the court's written response was neutral, and appellant has not argued that the answers were incorrect or misleading. Thus, the district court properly denied appellant's motion for postconviction relief because his due-process right to be present at all critical stages of the trial was not violated.

Removal or Recusal of the Judge

Finally, appellant argues that the judge who denied his petition should have recused himself or been removed from ruling on the petition. "[T]here is no automatic removal as of right in a postconviction proceeding." *Hooper v. State,* 680 N.W.2d 89, 92 (Minn. 2004) "No notice to remove shall be effective against a judge who . . . presided at the trial . . . except upon an affirmative showing of cause on the part of the judge." Minn. R. Crim. P. 26.03, subd. 13(4). "A request to disqualify a judge for cause shall be heard and determined by the chief judge of the judicial district or the assistant chief judge if the chief judge is the subject of the request." *Id.* subd. 13(3). Cause includes the grounds for disqualification under the Code of Judicial Conduct such as when "the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct, Canon 3D(1). "Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo." *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

Appellant argues that the judge is biased or impartial because he had improper communications with the deliberating jury. As previously discussed, appellant is unable to show that there were improper communications. Although appellant's motion to remove was not heard by the chief judge as required by rule 26.03, appellant is still not entitled to relief because the motion was entirely without merit and we disregard "[a]ny error, defect, irregularity or variance which does not affect substantial rights." Minn. R. Crim. P. 31.01. Because appellant has failed to affirmatively demonstrate any bias, prejudice, partiality, or appearance of impropriety that would constitute cause for removal, the district court appropriately denied the motion. *Johnson v. State*, 486 N.W.2d 825, 828 (Minn. App. 1992) ("The mere fact a judge presided at trial is not cause for removal in a postconviction proceeding"), *review denied* (Minn. Aug. 27, 1992).

Affirmed.