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STATE OF NEBRASKA, APPELLEE, V. LUCKY I. IROMUANYA, APPELLANT.

806 N.W.2d 404

Filed December 9, 2011. No. S-09-075.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** Under the two-pronged test for determining ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews counsel's performance and whether the defendant was prejudiced independently of the lower court's decision.
3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has a constitutional right to be represented by an attorney in all critical stages of a criminal prosecution.
5. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
7. **Postconviction: Constitutional Law: Effectiveness of Counsel: Proof.** To establish a right to postconviction relief for counsel's ineffective assistance, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the petitioner's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
8. **Criminal Law: Effectiveness of Counsel.** Counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
9. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.
10. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions.
11. ____: ____: ____: ____. Appellate courts must assess trial counsel's performance from counsel's perspective when counsel provided the assistance. An appellate court will not judge an ineffectiveness of counsel claim in hindsight.
12. **Effectiveness of Counsel: Proof: Appeal and Error.** In addressing the "prejudice" component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

13. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
14. **Effectiveness of Counsel: Presumptions.** A trial counsel's lack of relevant experience is a factor a court can consider, but it does not create a presumption of ineffective assistance of counsel.
15. **Trial: Effectiveness of Counsel: Proof.** Unless the defendant demonstrates that counsel failed to function in any meaningful sense as the prosecution's adversary, the defendant can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.
16. **Right to Counsel: Plea Bargains.** The plea bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
17. **Trial: Attorney and Client: Effectiveness of Counsel: Plea Bargains.** A trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law.
18. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
19. **Trial: Attorney and Client: Testimony: Waiver.** The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.
20. ____: ____: ____: ____. A trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record. Instead, defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
21. ____: ____: ____: ____. The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify.
22. **Trial: Attorney and Client.** The decision whether to testify, plead guilty, or waive a jury trial involves basic trial decisions for which the defendant has the ultimate authority.
23. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: if the defendant shows that counsel interfered with his or her freedom to decide to testify or if counsel's tactical advice to waive the right was unreasonable.
24. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to

prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.

25. ____: ____: ____: ____. When a criminal defendant claims his or her trial counsel was ineffective in failing to object to prosecutorial misconduct, an appellate court will focus on the "prejudice" component of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), unless the prosecutorial misconduct was so blatantly improper and highly prejudicial that even a minimally competent defense counsel would have objected.
26. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
27. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** In determining whether defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, an appellate court considers whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.
28. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
29. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
30. ____: ____. The following factors are relevant to determining whether prosecutorial misconduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.
31. **Juror Qualifications.** Voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exist sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.
32. **Constitutional Law: Juror Qualifications.** Voir dire plays a critical function in assuring the criminal defendant that his or her constitutional right to an impartial jury will be honored.
33. **Juror Qualifications: Parties.** The extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court.
34. ____: ____. A court should permit parties to ask prospective jurors questions about whether they can fulfill their duties impartially.
35. ____: ____. Parties may generally ask hypothetical questions designed to determine whether prospective jurors' preconceived attitudes or biases would prevent them from following the law or applying a legal theory or defense.
36. **Juror Qualifications: Attorneys at Law.** Counsel may not use voir dire to preview prospective jurors' opinions of the evidence that will be presented. Nor may counsel secure in advance a commitment from prospective jurors on the verdict

they would return, given a state of hypothetical facts. Parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.

37. **Criminal Law: Trial: Prosecuting Attorneys.** Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. They may not inflame the jurors' prejudices or excite their passions against the accused. This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.
38. **Juries: Prosecuting Attorneys.** Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim.
39. **Trial: Prosecuting Attorneys.** Prosecutors should not remark on evidence of questionable admissibility in an opening statement.
40. **Criminal Law: Trial: Prosecuting Attorneys: Appeal and Error.** A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.
41. **Trial: Prosecuting Attorneys: Jury Instructions: Appeal and Error.** Not every variance between a prosecutor's advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given and the remarks are not crucial to the State's case.
42. **Rules of Evidence: Witnesses: Juries.** Under Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2008), the credibility of a witness may be attacked by any party, including the party calling the witness. But a party may not use the rule as an artifice for putting before the jury substantive evidence that is otherwise inadmissible.
43. **Trial: Witnesses.** Evidence of a witness' bias is substantive, and a party can present it on direct or cross-examination.
44. **Trial: Effectiveness of Counsel.** That a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.
45. **Constitutional Law: Trial.** The right to a fair trial is a fundamental liberty secured by the 14th Amendment.
46. **Trial: Presumptions.** The presumption of innocence presents an essential safeguard of a fair trial.
47. **Trial: Evidence: Presumptions: Proof.** Under the presumption of innocence, the State must establish guilt solely through the probative evidence introduced at trial.
48. **Trial: Courts: Verdicts.** The right to a fair trial requires courts to be alert to courtroom practices that undermine the fairness of the factfinding process. The jury's verdict must rest on a dispassionate consideration of the evidence.
49. **Trial: Courts.** Where reason, principle, and common human experience indicate a probability of deleterious effects on fundamental rights, then a particular courtroom practice calls for close judicial scrutiny.
50. **Trial.** Certain procedures, such as compelling the defendant to attend trial in visible shackles, gagged, or in recognizable prison clothing, are inherently prejudicial to the defendant's right to a fair trial and, thus, subject to close scrutiny.

51. **Criminal Law: Trial: Courts: Jury Instructions.** The wearing of victim memorial buttons by spectators at a criminal proceeding could prejudice a defendant's right to a fair trial. But this conduct is not per se inherently prejudicial. Instead, the issues are whether the memorial displays rise to the level of creating an unacceptable threat to a fair trial and whether the threat can be cured by the court's admonitions and instructions to juries.
52. **Criminal Law: Trial: Courts: Juries.** To avoid potential prejudice from victim memorial displays, trial courts must act promptly to protect jurors from even a suspicion of bias or prejudice resulting from spectators' conduct in a criminal trial.
53. ____: ____: ____: ____. After receiving any information that spectators are displaying victim memorials—regardless of whether defense counsel has moved to prohibit such conduct—a trial court should immediately determine, out of the presence of the jury, who, if anyone, is displaying the memorials, and what message, if any, that the displays convey.
54. **Jury Instructions.** Whether a jury instruction is correct presents a question of law.
55. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
56. **Criminal Law: Due Process: Proof.** Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged.
57. **Criminal Law: Homicide: Presumptions.** The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed.
58. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.
59. **Constitutional Law: Discrimination: Prosecuting Attorneys.** The Constitution prohibits racially biased prosecutorial arguments.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In this postconviction proceeding, Lucky I. Iromuanya alleged multiple claims of ineffective assistance of counsel directed at

his trial and appellate counsel. The district court overruled his motion without an evidentiary hearing. Because Iromuanya has either failed to allege facts showing his counsel's deficient assistance or failed to allege facts showing that he was prejudiced by his counsel's alleged deficiencies, we affirm.

I. BACKGROUND

In *State v. Iromuanya* (*Iromuanya I*),[1] we affirmed Iromuanya's convictions for attempted second degree murder, second degree murder, and two related counts of use of a weapon. We modified his life-to-life sentence for second degree murder to not less than 50 years' imprisonment nor more than life imprisonment.

1. Factual Background

We summarize the facts from *Iromuanya I*. Iromuanya fired a single shot from a handgun that wounded Nolan Jenkins and killed Jenna Cooper. The shooting occurred at Cooper's residence during a party at which the guests were drinking. Iromuanya was dating one of the guests, Margaret Rugh. Rugh had invited Iromuanya and Aroun Phaisan, a friend of Iromuanya, to the party. About 1:30 a.m., one of the guests, Nathanial Buss, informed Cooper's roommate, Lindsey Ingram, that a male, whom he knew but did not name, had stolen some shot glasses. Buss pointed the person out, and Ingram went out to confront him. Meanwhile, Buss also informed Cooper of the theft, and Cooper went outside, followed by Buss. Iromuanya and Phaisan decided to leave because they thought someone would accuse them.

Ingram saw Iromuanya and Phaisan leaving and told them that no one could leave until the shot glasses were returned. At this point, Jenkins went outside also. Once outside, Jenkins immediately grabbed Iromuanya's sweatshirt with both hands, pushed him backward, and asked if he had stolen anything. Iromuanya stated that he had not done anything and tried to push Jenkins away. The two scuffled for about 5 seconds before they were separated. As they were being separated,

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[1] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Iromuanya punched Jenkins. Phaisan stepped between them, and Jenkins' friend placed Iromuanya in a bear hug to keep him away from Jenkins.

After being separated, Buss informed Jenkins that Iromuanya had not taken the shot glasses. Ingram attempted to calm Iromuanya several times, but he remained agitated and focused on Jenkins. After Ingram and Jenkins walked away to retrieve the shot glasses, Cooper and Buss also tried to talk to Iromuanya, but he was still agitated.

About 5 minutes after the initial confrontation, Jenkins walked toward Iromuanya to apologize. Another guest saw that Iromuanya was becoming more agitated and yelled to him that Jenkins was trying to apologize. Some witnesses testified that Jenkins had his hand outstretched to shake hands. Jenkins approached within a step of Iromuanya, and Iromuanya shoved him, knocking Jenkins backward. Phaisan and another guest stepped in front of Iromuanya to restrain him. But Iromuanya took the handgun from his trousers and shot at Jenkins, who was 5 feet away. The bullet entered Jenkins' left temple, exited above his left ear, and pierced Cooper's neck, killing her. Iromuanya and Phaisan fled in Phaisan's vehicle.

Rugh was in the house during the shooting. She spoke to Iromuanya shortly after the shooting on her cellular telephone. He told her to say that she did not know him and that his name was "Charles Allen." Later, in police interviews, including one shortly after the shooting, Rugh told officers that when she told Iromuanya he had shot a girl, he asked, "'Not a guy?'" The police arrested Iromuanya later that evening.

At trial, the court admitted his videotaped statement and handwritten statement into evidence. Iromuanya did not testify or present evidence. The same counsel represented him at trial and on direct appeal. The district court appointed different counsel for this postconviction proceeding.

2. Postconviction Motion and Order

In his postconviction motion, Iromuanya alleged a list of ineffective assistance claims. He alleged that his trial counsel

provided ineffective assistance at several stages. He also claimed that his appellate counsel was ineffective for failing to raise each claim regarding trial counsel's ineffectiveness on direct appeal.

Iromuanya alleged that during plea negotiations, he would have pleaded to a lesser offense if counsel had adequately advised him of the prosecution's offers. Regarding the jury selection process, he alleged that trial counsel failed to sufficiently use juror questionnaires and individual voir dire to determine and counter the effects of pretrial publicity on jurors. And he claimed that trial counsel failed to object to the jury selection process and failed to create a record of the community's ethnic and racial makeup. He alleged that persons of his race, and members of ethnic and racial minorities generally, were underrepresented in the jury pool.

Iromuanya alleged that trial counsel lacked the experience to defend against four major felonies and handle the pretrial publicity and complex issues presented at the trial and on appeal. And he claimed that trial counsel was ineffective in advising him whether he should testify.

More specifically, Iromuanya alleged that trial counsel failed to object to the prosecutor's remarks to jurors during jury selection, his opening statements, and his improper questioning of a witness. He also alleged that trial counsel failed to sufficiently object to memorial buttons that the victims' family members had worn and to create an adequate record for appellate review; effectively examine or cross-examine witnesses; and object to a witness' inadmissible testimony.

Next, Iromuanya alleged that trial counsel failed to present a coherent and comprehensible defense in closing argument and also failed to challenge erroneous jury instructions. Further, Iromuanya alleged that appellate counsel failed to challenge these instructions on direct appeal. Finally, he alleged that trial counsel failed to argue that Iromuanya was entitled to a self-defense instruction under Neb. Rev. Stat. § 28-1409(4) (Reissue 2008).

As noted, the court overruled his motion without an evidentiary hearing.

II. ASSIGNMENT OF ERROR

Iromuanya assigns that the court erred in failing to grant an evidentiary hearing on all of the above claims of ineffective assistance of trial counsel and appellate counsel.

III. STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[2] Under the two-pronged test set out in *Strickland v. Washington*,[3] we review counsel's performance and whether the defendant was prejudiced independently of the lower court's decision.[4]

IV. ANALYSIS

[3-6] The core issue is whether the court erred in dismissing Iromuanya's postconviction motion without an evidentiary hearing. A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[5] A defendant has a constitutional right to be represented by an attorney in all critical stages of a criminal prosecution.[6] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[7] But if a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.[8]

1. Governing Principles

[7] Because the same attorneys represented Iromuanya at trial and on direct appeal, his postconviction motion is his first

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[2] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] See *McGhee, supra* note 2.

[5] See *id.*

[6] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[7] *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

[8] See *McGhee, supra* note 2.

opportunity to assert trial counsel's ineffectiveness.[9] To establish a right to postconviction relief for counsel's ineffective assistance, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the petitioner's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[10]

[8-11] Counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.[11] In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.[12] When reviewing claims of ineffective assistance, we will not second-guess trial counsel's reasonable strategic decisions.[13] And we must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.[14] An appellate court will not judge an ineffectiveness of counsel claim in hindsight.[15]

[12] In addressing the "prejudice" component of the *Strickland* test, we focus on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.[16] To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result would have been different.[17]

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[9] See *id.*

[10] See *id.*

[11] See, *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), quoting *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[12] See *Haas, supra* note 11.

[13] See *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

[14] See *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), quoting *Strickland, supra* note 3.

[15] *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

[16] See, *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

[17] See *McGhee, supra* note 2.

A reasonable probability is a probability sufficient to undermine confidence in the outcome.[18]

[13] Furthermore, when a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test.[19] Obviously, if trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.[20]

2. Trial Counsel's Lack of Experience

[14,15] We will not decide in a vacuum whether Iromuanya's trial counsel lacked the experience to defend his case.[21] It is true that a trial counsel's lack of relevant experience is a factor a court can consider, but it does not create a presumption of ineffective assistance of counsel.[22] Unless the defendant "demonstrate[s] that counsel failed to function in any meaningful sense as the [prosecution's] adversary," the defendant can "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel."[23] Iromuanya did not claim that his trial counsel's performance was so inadequate as to constitute a breakdown in the adversarial process. So we focus on his allegations of specific errors.

3. Plea Negotiations

Iromuanya argues that the court erred in rejecting his claim that he would have pleaded to a lesser offense if counsel had adequately advised him of the prosecution's plea offers.

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[18] *Gonzalez-Faguaga, supra* note 16, citing *Strickland, supra* note 3.

[19] See *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[20] See *id.*

[21] See *Joubert, supra* note 14, quoting *Strickland, supra* note 3.

[22] See *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[23] *Id.*, 466 U.S. at 666.

[16,17] The plea bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.[24] And a trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law.[25]

Iromuanya takes it one step further. He argues that a court should grant an evidentiary hearing whenever a postconviction motion alleges trial counsel's failure to communicate a plea offer. But even assuming that such allegations might require an evidentiary hearing in some circumstances—an issue we do not reach—they did not warrant a hearing here.

As the court noted, at Iromuanya's sentencing hearing, his trial counsel stated that (1) he had sent a letter to the prosecution extending Iromuanya's offer to plead guilty to manslaughter; and (2) if the prosecutor had accepted the offer, Iromuanya would have pleaded guilty. But Iromuanya's argument lacks a critical antecedent—he does not allege that the prosecutor offered him a plea agreement. Under this record, Iromuanya's allegations are insufficient to overcome the presumption that his trial counsel acted reasonably.

4. Jury Selection Process

Iromuanya argues that the court erred in rejecting his claims that his trial counsel failed to preserve his right to a fair and impartial jury. Regarding Iromuanya's argument about the ethnic and racial makeup of the jury, the court concluded that he had not alleged sufficient facts to show that African-American and other ethnic groups were available within the randomly selected jury pool. As we know, an evidentiary hearing is not required if a postconviction motion alleges only conclusions of fact or law. We conclude that Iromuanya failed to allege sufficient facts to support his claim that minorities were underrepresented in the jury pool.

Iromuanya also alleged that his trial counsel failed to counter the effects of pretrial publicity. But the record affirmatively

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[24] See, *Hill, supra* note 11; *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008); *Zarate, supra* note 11.

[25] See *Lopez, supra* note 24.

refutes Iromuanya's allegations. During jury selection, the trial judge stated that he knew from the jurors' questionnaires that most of them had already heard something about the case. Rather than risk having jurors learn from another juror's response to questioning something about the case that they did not know, the judge decided that counsel could individually question the potential jurors. And he emphasized that they must return a verdict solely on the evidence. The record reflects that counsel individually questioned the potential jurors. Iromuanya's claim lacks merit.

5. Advisement Whether to Testify

Iromuanya claimed that trial counsel was ineffective in advising him whether he should testify. He alleged that if his attorney had given him reasonable advice, he would not have waived his right to testify. The court determined that because Iromuanya waived his right to testify, this claim was refuted. We disagree that Iromuanya's waiver resolves the advisement issue. But we conclude that the record shows that the trial court did not err in denying Iromuanya postconviction relief on this claim.

[18-21] A defendant has a fundamental constitutional right to testify.[26] The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.[27] But a trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record.[28] Instead, "defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant

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[26] See *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

[27] See, *Goff v. Bagley*, 601 F.3d 445 (6th Cir. 2010); *U.S. v. Ward*, 598 F.3d 1054 (8th Cir. 2010); *Owens v. U.S.*, 483 F.3d 48 (1st Cir. 2007); *U.S. v. Mullins*, 315 F.3d 449 (5th Cir. 2002); *U.S. v. Manjarrez*, 258 F.3d 618 (7th Cir. 2001); *Chang v. U.S.*, 250 F.3d 79 (2d Cir. 2001); *Sexton v. French*, 163 F.3d 874 (4th Cir. 1998); *U.S. v. Joelson*, 7 F.3d 174 (9th Cir. 1993); *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992).

[28] See *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990).

to make."[29] In discussing this responsibility, the 11th Circuit has explained the important role counsel's advice plays in securing a defendant's right to testify or not:

> This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." . . . Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel.[30]

The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify.[31]

[22] Iromuanya's claim that he would have testified but for his trial counsel's advice mirrors a defendant's claim that he or she would not have pleaded guilty or waived a jury trial but for trial counsel's advice. These decisions also involve basic trial decisions for which the defendant has the ultimate authority.[32] And we have recognized that a defendant can base an ineffective assistance of counsel claim on trial counsel's unreasonable tactical advice in making these decisions.[33] In reviewing a defendant's waiver of a jury trial, we have explicitly stated that counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance when the advice is unreasonable or when counsel interferes with a client's freedom to decide to waive a jury trial.[34]

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[29] See *State v. White*, 246 Neb. 346, 351, 518 N.W.2d 923, 926 (1994), citing *Teague, supra* note 27. Accord *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

[30] *Teague, supra* note 27, 953 F.2d at 1533 (emphasis in original).

[31] See *Lema v. U.S.*, 987 F.2d 48 (1st Cir. 1993).

[32] See *Nixon, supra* note 29.

[33] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

[34] *Seberger, supra* note 33.

[23] We have implicitly applied the same ineffective assistance rule to a defendant's decision to waive his or her right to testify. Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.[35]

It is true that federal appellate courts disagree whether a defendant's voluntary waiver may be inferred from the defendant's failure to testify at trial or failure to alert the trial court to his or her desire to testify.[36] But we need not decide whether a defendant's conduct or silence can constitute a waiver of his or her right to testify. Here, the record shows that at the close of the State's evidence, Iromuanya waived his right to testify and present witnesses. In response to the court's questions, he stated that he had discussed whether to testify with his attorney; he confirmed that he had freely and voluntarily decided not to testify. He specifically stated that he knew that the decision was his regardless of his attorney's advice. Because the record shows defense counsel did not interfere with Iromuanya's decision not to testify, the only issue is whether counsel's advice was unreasonable and prevented Iromuanya from meaningfully waiving his right to testify.

Iromuanya alleged that if he had received reasonable advice, he would have testified that he had not intentionally fired a shot at Jenkins; the shooting occurred during a sudden quarrel; Jenkins was the aggressor; and Iromuanya was restrained against his will. But the jurors heard his statements to this effect when they viewed his videotaped statements and when a witness read his written statement. Trial counsel again played a part of the videotaped statement during closing argument. We conclude that because the record shows that the jury heard

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[35] See, *White, supra* note 29; *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *El-Tabech, supra* note 28; *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981). Accord *Lema, supra* note 31.

[36] Compare *Chang, supra* note 27, with *Goff, supra* note 27; *Frey v. Schuetzle*, 151 F.3d 893 (8th Cir. 1998); and *Joelson, supra* note 27.

Iromuanya's statement of events from his police interview, he was not prejudiced by his trial counsel's alleged failure to reasonably advise him to testify.[37]

6. Prosecutorial Misconduct

Iromuanya contends that the court erred in rejecting his claims that counsel was ineffective by failing to object to the following alleged instances of prosecutorial misconduct: (1) making improper remarks to jurors during voir dire; (2) making improper remarks about the victims during the opening statement; and (3) eliciting testimony from two witnesses that was intended to elicit the jurors' sympathy for the victims.

(a) Standard for Reviewing Ineffective Assistance Claims Based on Prosecutorial Misconduct

[24] Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct obviously requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[38] But even when a prosecutor's conduct or remarks are misconduct, defense counsel might have made a sound tactical decision in not objecting: "It is not beyond comprehension to envision an instance where a surely winnable objection may still hurt the defense in the eyes of the jury."[39] Alternatively, trial counsel may decide that the prosecutor's remarks support the defense's position or are not worth distracting the jury from a more important point.

[25-27] We give defense counsel's decision not to object to a prosecutor's conduct or remark a strong presumption of reasonableness. We will not lightly conclude that counsel was ineffective for failing to object to every instance of prosecutorial misconduct. Unless the prosecutorial misconduct was so blatantly improper and highly prejudicial that even a minimally

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[37] See *U.S. v. Walters*, 163 Fed. Appx. 674 (10th Cir. 2006).

[38] See, e.g., *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[39] *Ayers v. State*, 802 A.2d 278, 283 (Del. 2002).

competent defense counsel would have objected,[40] we will focus on the "prejudice" component of the *Strickland* test. The prejudice component focuses on whether defense counsel's performance rendered the trial unreliable or the proceeding fundamentally unfair.[41] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[42] So in determining whether defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, we consider whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.[43]

(b) Relevant Factors for Evaluating Whether Prosecutorial Misconduct Prejudiced a Defendant's Right to a Fair Trial

[28-30] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[44] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[45] When a prosecutor's conduct was improper, we adopt the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the

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[40] See *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000).

[41] See, *Lockhart, supra* note 16; *Gonzalez-Faguaga, supra* note 16.

[42] See, *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[43] See, *Graves v. Ault*, 614 F.3d 501 (8th Cir. 2010); *Land v. Allen*, 573 F.3d 1211 (11th Cir. 2009); *Latchison v. Felker*, 382 Fed. Appx. 542 (9th Cir. 2010); *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[44] See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[45] See *id.*

court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[46]

(c) Analysis

(i) Remarks to Jurors During Voir Dire

The prosecutor asked prospective jurors to think of how a person's intent can be inferred and reasons that a person might lie about his or her intent after committing an act. He also explained the theory of transferred intent and asked whether anyone thought the theory was unfair as applied to a hypothetical example. Later, he asked whether any potential jurors had training in the use of firearms and whether they had been trained to fire a warning shot. When a prospective juror stated that his work protocol called for firing a warning shot, the prosecutor responded that he thought it was "probably a pretty good idea, too." The prosecutor's questions about what weight jurors would give to evidence were limited to asking whether jurors believed they could give the same weight to circumstantial evidence as to direct evidence. He made no reference to the facts of the case.

The postconviction court concluded that the prosecutor had properly questioned potential jurors about their views on intent, whether they could apply the theory of transferred intent, and their familiarity with firearm safety. It further concluded that the prosecutor's comments on the necessity of firing a warning shot did not prejudice Iromuanya. The court stated that at trial, it had instructed jurors that they should not consider comments made during voir dire as evidence and again instructed the jury at the close of evidence that counsel's comments were not evidence.

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[46] See, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *U.S. v. Reid*, 625 F.3d 977 (6th Cir. 2010); *U.S. v. Bell*, 624 F.3d 803 (7th Cir. 2010); *Graves, supra* note 43; *U.S. v. Whitten*, 610 F.3d 168 (2d Cir. 2010); *U.S. v. Davis*, 609 F.3d 663 (5th Cir. 2010); *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010); *U.S. v. Lopez*, 590 F.3d 1238 (11th Cir. 2009); *U.S. v. McElroy*, 587 F.3d 73 (1st Cir. 2009); *U.S. v. Portillo-Quezada*, 469 F.3d 1345 (10th Cir. 2006); *U.S. v. Scheetz*, 293 F.3d 175 (4th Cir. 2002).

In his postconviction appeal, Iromuanya argues that in questioning the jurors, the prosecutor impermissibly presented evidence and his personal opinion on whether a warning shot was required before shooting a firearm in the direction of a person. He also argues that the prosecutor improperly argued transferred intent and improperly solicited information on the weight potential jurors would give to circumstantial evidence and the type of circumstantial evidence that they believed would show intent.

[31] In questioning prospective jurors, a court should allow attorneys reasonable leeway to ask questions relevant to exercising a party's peremptory challenges:

> [V]oir dire examination of prospective jurors "requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists [sic] sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge."[47]

[32,33] Although this statement is correct, voir dire also "'plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.'"[48] Nonetheless, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court.[49] But there are, of course, limits to a court's discretion.

[34-36] A court should permit parties to ask prospective jurors questions about whether they can fulfill their duties impartially.[50] So parties may generally ask hypothetical questions

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[47] *State v. Shipps*, 265 Neb. 342, 349, 656 N.W.2d 622, 629 (2003), quoting *Oden v. State*, 166 Neb. 729, 90 N.W.2d 356 (1958), citing Neb. Rev. Stat. § 25-1106 (Reissue 1943).

[48] *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992), quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) (plurality opinion). Accord *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008).

[49] See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[50] See *Morgan, supra* note 48.

designed to determine whether prospective jurors' preconceived attitudes or biases would prevent them from following the law or applying a legal theory or defense.[51] But counsel may not use voir dire to preview prospective jurors' opinions of the evidence that will be presented. Nor may counsel secure in advance a commitment from prospective jurors on the verdict they would return, given a state of hypothetical facts.[52] Summed up, the parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.[53]

Applying these standards, we conclude that the prosecutor's questions and remarks about transferred intent were intended to ensure that prospective jurors could apply this legal theory impartially. He asked if any of them considered the theory of transferred intent unfair. He did not ask them if they could convict a defendant based upon a set of hypothetical facts that the State intended to prove. These questions fall short of misconduct.

But the prosecutor improperly remarked and questioned prospective jurors about what type of circumstantial evidence would show a person's intent and whether a warning shot is required before firing a gun in the direction of a person. He did not limit his questions on circumstantial evidence to whether prospective jurors could infer a person's intent from indirect evidence. Instead, his questions about why persons might lie about their intent and his remarks about warning shots were clearly intended to persuade prospective jurors to the State's viewpoint of the evidence before they heard it.

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[51] See, e.g., *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000); *State v. Moore*, 122 N.J. 420, 585 A.2d 864 (1991); *Wells v. State*, 848 N.E.2d 1133 (Ind. App. 2006).

[52] See, *People v. Abilez*, 41 Cal. 4th 472, 161 P.3d 58, 61 Cal. Rptr. 3d 526 (2007); *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007); *State v. Taylor*, 875 So. 2d 58 (La. 2004); *State v. Jones*, 347 N.C. 193, 491 S.E.2d 641 (1997); *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001); *State v. Frederiksen*, 40 Wash. App. 749, 700 P.2d 369 (1985).

[53] *People v. Bowel*, 111 Ill. 2d 58, 488 N.E.2d 995, 94 Ill. Dec. 748 (1986); *State v. Clark*, 981 S.W.2d 143 (Mo. 1998).

As explained, voir dire is not the time for closing argument. Yet, we cannot conclude that the prosecutor's remarks prejudiced Iromuanya's right to an impartial jury. Before voir dire, the court advised prospective jurors that the attorneys' statements and arguments were not evidence. And Iromuanya's trial counsel produced ample evidence and argument to rebut the State's viewpoint. He forcefully argued in closing that Iromuanya did not shoot at Jenkins with an intent to kill, and he played Iromuanya's statement to the police in closing arguments specifically to bolster that argument. Because of the court's instruction and trial counsel's countervailing arguments, the prosecutor's comments during voir dire did not prejudicially influence the jury.

(ii) Improper Appeal to Jurors' Sympathies

Iromuanya contends that during opening statements, the prosecutor made improper statements about the personal attributes of the victims. He argues that these statements prejudiced his right to an impartial jury and that the prosecutor could not have reasonably believed that they would be supported by admissible evidence. Iromuanya also contends that the prosecutor improperly used Jenkins' testimony to display his emotions upon learning of Cooper's death at the hospital.

At the beginning of his opening argument, the prosecutor stated that Cooper had been studying mechanical engineering, was named a "First Team All Big 12" soccer player, was voted most valuable player, and would have led her team into the National Collegiate Athletic Association tournament if she had not been killed. Regarding Jenkins, he listed Jenkins' high school athletic endeavors and stated that Jenkins had earned a Regents Scholarship and would be receiving a nursing degree.

[37-39] In deciding this issue, we are guided by the following principles. Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[54] They may not inflame the jurors' prejudices or

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[54] See *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, McCulloch, supra* note 42.

excite their passions against the accused.[55] This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.[56] As relevant here, prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim. These facts lack any relevance to the criminal prosecution[57]—and they have the potential to evoke jurors' sympathy and outrage against the defendant.[58] Prosecutors also should not remark on evidence of questionable admissibility in an opening statement.[59]

[40,41] But "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[60] "[N]ot every variance between [a prosecutor's] advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given" and the remarks are not crucial to the State's case.[61]

As noted, the court orally instructed prospective jurors before trial that the attorney's statements and arguments were

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[55] See *id.*

[56] See, e.g., *U.S. v. Conrad*, 320 F.3d 851 (8th Cir. 2003); *U.S. v. Hands*, 184 F.3d 1322 (11th Cir. 1999); *U.S. v. Vaulin*, 132 F.3d 898 (3d Cir. 1997); *United States v. Millen*, 594 F.2d 1085 (6th Cir. 1979). See, also, Annot., 19 A.L.R.4th 368 (1983).

[57] See *Iromuanya I, supra* note 1.

[58] See, *Clark v. Com.*, 833 S.W.2d 793 (Ky. 1991); *State v. Rodriguez*, 365 N.J. Super. 38, 837 A.2d 1137 (2003).

[59] See, *U.S. v. Valencia*, 600 F.3d 389 (5th Cir. 2010); *U.S. v. Brassard*, 212 F.3d 54 (1st Cir. 2000); *U.S. v. Adams*, 74 F.3d 1093 (11th Cir. 1996); *U.S. v. Novak*, 918 F.2d 107 (10th Cir. 1990); *United States v. Hernandez*, 779 F.2d 456 (8th Cir. 1985); *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), *disapproved on other grounds, State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

[60] *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[61] *Frazier v. Cupp*, 394 U.S. 731, 736, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969).

not evidence. And the prosecutor's improper remarks in his opening statement were followed by a long trial. Many witnesses testified on Iromuanya's intent in firing the shot at Jenkins that wounded Jenkins and killed Cooper. As we stated in *Iromuanya I*,[62] whether Iromuanya fired the shot with the intent to kill Jenkins was the critical issue. The court's written instructions informed the jurors that they must not decide the case on sympathy or prejudice. In attempting to extol the victims, the prosecutor stepped out of bounds. But we conclude that the prosecutor's opening statement did not so influence the jurors that they could not follow the court's instruction to dispassionately weigh all the evidence that followed on the issue of intent.[63]

For the same reason, we conclude that the prosecutor's questioning of Jenkins did not deny Iromuanya a fair and impartial trial. The prosecutor asked Jenkins to recall what he remembered from being in the hospital and when he had learned that Cooper had died. This questioning elicited Jenkins' emotional testimony that while he was still in the hospital, he was wheeled down to see Cooper and held her hand but did not realize that she had died. He stated that he learned of her death the next day when he asked Ingram how Cooper was doing and Ingram started crying. When trial counsel finally objected and moved for a mistrial, the court overruled the motion as untimely. In his affidavit accompanying the motion for a new trial, trial counsel stated that by the time he understood where the questioning was going, he saw at least two jurors crying and the rest staring intently at Jenkins.

Obviously, evidence showing that Jenkins was shot in the head was relevant to whether Iromuanya intended to kill him. But even if Jenkins' mental functioning at the hospital had been relevant to Iromuanya's intent to kill, no proper purpose existed for the prosecutor's questions to Jenkins about when he learned of Cooper's death. Those questions could only elicit irrelevant testimony, and the prosecutor should have known

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[62] *Iromuanya I, supra* note 1.

[63] See *Frazier, supra* note 61.

that the questions would elicit highly emotional testimony. We conclude that the questioning was improper.

But on this record, we conclude that even if Iromuanya's trial counsel had timely objected to this questioning or testimony, no reasonable probability exists that the jury would have acquitted Iromuanya. This testimony was only a small part of the State's evidence. Like the emotional testimony of Cooper's mother that we discussed in *Iromuanya I*, Jenkins' testimony, "[w]hile legally irrelevant, . . . had no prejudicial bearing on the issue of intent."[64] Here, the State's evidence on intent was strong and the court instructed the jury not to decide the case on sympathy or prejudice. So while the prosecutor's appeal to jurors' sympathies was improper, the prejudicial effect was tempered by the strength of the evidence and the court's instructions. We conclude that the improper questioning did not deprive Iromuanya of a fair trial.

(iii) Prosecutor's Impeachment of State's Witness

Iromuanya also argues that the prosecutor's impeachment of Phaisan constituted prosecutorial misconduct. First, he argues that Phaisan's testimony in response to the prosecutor's impeachment questions prejudiced him. Phaisan testified that he lived with a woman who was the sister of a woman with whom Iromuanya had fathered out-of-wedlock children.

The record shows that after the prosecutor established that Iromuanya and Phaisan were longtime friends, Iromuanya's trial counsel asked to approach the bench. He moved in limine to exclude from evidence facts about Iromuanya's out-of-wedlock children. He argued that the court should exclude the evidence under Neb. Evid. R. 403[65] and that it was improper character evidence. The court overruled that motion, concluding that the evidence was admissible on Phaisan's credibility. Trial counsel repeated his objections during the prosecutor's questioning.

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[64] *Iromuanya I, supra* note 1, 272 Neb. at 198, 719 N.W.2d at 284.

[65] Neb. Rev. Stat. § 27-403 (Reissue 2008).

Despite Iromuanya's claim that this questioning was prosecutorial misconduct that his trial counsel failed to address, the record affirmatively shows that his trial counsel did object to this line of questioning. Because this claim fails to show ineffective assistance, it is without merit in this postconviction appeal.

Iromuanya also claims that his trial counsel failed to object to the prosecutor's improper questioning of Phaisan on redirect examination about the number of times that he had visited Iromuanya in jail. Iromuanya's trial counsel did not object to this questioning, but we conclude that it was not prosecutorial misconduct.

[42,43] Under Neb. Evid. R. 607,[66] the credibility of a witness may be attacked by any party, including the party calling the witness.[67] But a party may not use the rule as an artifice for putting before the jury substantive evidence that is otherwise inadmissible.[68] Evidence of a witness' bias, however, is substantive, and a party can present it on direct or cross-examination.[69] Showing bias appears to have been the prosecutor's purpose in this questioning. Because the evidence was admissible to show bias, the questioning did not constitute prosecutorial misconduct.

Summing up, we conclude that Iromuanya has either failed to allege facts that show prosecutorial misconduct or, under our balancing test, has failed to allege facts that show that the prosecutorial misconduct prejudiced Iromuanya's right to a fair trial. Because he has failed to allege facts showing that any prosecutorial misconduct deprived him of a fair trial, he cannot show prejudice from his trial counsel's alleged ineffective assistance regarding these claims.

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[66] Neb. Rev. Stat. § 27-607 (Reissue 2008).

[67] See *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982).

[68] See, e.g., *State v. Jackson*, 217 Neb. 363, 348 N.W.2d 876 (1984); *Brehmer, supra* note 67.

[69] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), citing *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984). Compare *U.S. v. Dunson*, 142 F.3d 1213 (10th Cir. 1998).

7. Ineffective Questioning of Witnesses

[44] We also reject Iromuanya's claims that trial counsel was ineffective in his questioning of two of the State's witnesses: Nathaniel Buss and Margaret Rugh. He argues that trial counsel should not have attempted to impeach the credibility of these witnesses. We have reviewed the record and conclude that these claims involve issues of trial strategy that we will not second-guess. That a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.[70]

8. Spectators' Memorial Buttons

In *Iromuanya I*, we affirmed the trial court's denial of a new trial for spectator misconduct. We stated that trial counsel had moved in limine before the second day of voir dire started to preclude spectators from wearing memorial buttons "'with Jenna Cooper's face or photo or something like that.'"[71] But the court took the objection under advisement, and its ruling was not part of the record. We noted that trial counsel had submitted an affidavit with his motion for a new trial. In that motion, he stated that on the third day of trial, the court had instructed spectators not to wear the buttons in court. In denying Iromuanya's motion for a new trial, the court stated that there was no evidence any juror saw the buttons or was influenced by them.

On appeal, we concluded that trial counsel had failed to create an adequate record to determine that the court had abused its discretion. We stated that the record failed to show how many people wore buttons, where they sat, the size and contents of the buttons, or the precise reason for the court's ruling on the motion in limine. We distinguished these facts from the evidence presented in *Musladin v. Lamarque*.[72] There, "[a] divided panel of the Ninth Circuit Court of Appeals held that

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[70] See *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[71] See *Iromuanya I, supra* note 1, 272 Neb. at 199, 719 N.W.2d at 284.

[72] *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *overruled sub nom. Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

the defendant was entitled to a writ of habeas corpus because the wearing of the buttons created an unacceptable risk that impermissible factors came into play, which was inherently prejudicial."[73] In *Iromuanya I*, we stated that trial counsel could not fail to timely move for a mistrial, gamble on a favorable result, and then assert a previously waived error.

In his postconviction motion, Iromuanya claimed his trial counsel was ineffective in failing to (1) timely object to the victims' family members' wearing of memorial buttons, (2) demand an immediate ruling on his objection or a mistrial, and (3) make an adequate record for appellate review. In denying Iromuanya postconviction relief for this claim, the district court concluded that the presence of memorial buttons did not prejudice Iromuanya because (1) "what little evidence there is" suggested that the buttons were worn only during jury selection; (2) Iromuanya had not alleged that any juror was exposed to the buttons; and (3) the court had instructed jurors not to permit sympathy or prejudice to influence their decision.

Iromuanya contends that the district court erred in denying him postconviction relief on the ground that the record was insufficient to show that jurors were exposed to the memorial buttons. He argues that his claim is based on his trial counsel's failure to create an adequate record to evaluate prejudice. But this argument ignores Iromuanya's burden to allege how his trial counsel's alleged deficient performance prejudiced his defense. We conclude that he has not satisfied this burden.

[45-49] The right to a fair trial is a fundamental liberty secured by the 14th Amendment.[74] The presumption of innocence presents an essential safeguard of a fair trial.[75] Under the presumption of innocence, the State must establish guilt solely

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[73] See *Iromuanya I, supra* note 1, 272 Neb. at 201, 719 N.W.2d at 286, citing *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

[74] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), citing *Estelle, supra* note 73.

[75] See *id.*, citing *Estelle, supra* note 73.

through the probative evidence introduced at trial.[76] The right to a fair trial requires courts to be alert to courtroom practices that undermine the fairness of the factfinding process.[77] The jury's verdict must rest on a dispassionate consideration of the evidence.[78] "[W]here 'reason, principle, and common human experience' indicate a 'probability of deleterious effects on fundamental rights,' then the procedure 'calls for close judicial scrutiny.'"[79]

[50] As we have recognized, "certain procedures, such as compelling the defendant to attend trial in visible shackles, gagged, or in recognizable prison clothing, [are] 'inherently prejudicial' to the defendant's right to a fair trial and, thus, subject to close scrutiny."[80] In these cases, the scene presented to the jurors simply poses an unacceptable threat of "'"impermissible factors coming into play"'" in the jury's determination of guilt.[81]

In *Musladin*,[82] the case we distinguished in *Iromuanya I*, the Ninth Circuit granted habeas relief on an unfair trial claim connected to memorial buttons worn by the victim's family members. There, the defendant's murder trial lasted 14 days. At least on some days of the trial, some members of the victim's family, who were sitting in the front row of the gallery, wore buttons with the victim's photograph. Before opening statements, the trial court had denied defense counsel's motion to order the family members not to wear the buttons during trial.[83]

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[76] See *id.*, citing *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

[77] See *id.*, quoting *Estelle, supra* note 73.

[78] See *id.*, quoting *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960).

[79] *Id.* at 668, 757 N.W.2d at 15, quoting *Estelle, supra* note 73.

[80] *Id.*, citing *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

[81] *Id.* at 669, 757 N.W.2d at 15, quoting *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[82] *Musladin, supra* note 72.

[83] See *Carey, supra* note 72.

Relying on the U.S. Supreme Court's decision in *Holbrook v. Flynn*,[84] a California Court of Appeal concluded that the practice should be discouraged because the displays constituted an impermissible factor coming into play. But it concluded that because the jurors in the defendant's case were unlikely to have interpreted the buttons as anything but a sign of normal grief—the buttons did not brand the defendant with an unmistakable mark of guilt.[85]

In granting the state inmate habeas relief, the Ninth Circuit in *Musladin* determined that the state court's requirement that the spectators' conduct brand the defendant with a mark of guilt was an unreasonable application of clearly established federal law. It held that when a court concludes that courtroom conduct allows an impermissible factor to come into play, the "inherent prejudice" test is satisfied. It relied on its decision in *Norris v. Risley*,[86] an earlier case applying Supreme Court precedent on prejudicial courtroom practices to spectator conduct.

In overruling *Musladin*, the Supreme Court stated that only its holdings constituted clearly established federal law in deciding whether to grant habeas relief from a state court decision. It acknowledged that it had previously stated that the test for "inherent prejudice" is "'whether "an unacceptable risk is presented of impermissible factors coming into play."'"[87] But it distinguished its earlier cases as dealing only with "government-sponsored practices."[88] It also noted that state courts had diverged widely on whether memorial displays by spectators prejudiced a defendant's right to a fair trial. Because the prejudicial effect of spectators' memorial displays was still an open question in the Court's jurisprudence, the state court's decision was neither contrary to nor an unreasonable application of its holdings.

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[84] *Holbrook, supra* note 81.

[85] See *Carey, supra* note 72.

[86] *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990).

[87] *Carey, supra* note 72, 549 U.S. at 75.

[88] *Id.*

Yet, in a well-reasoned concurrence, Justice Souter concluded that the Court's unacceptable risk standard did reach the conduct of courtroom visitors and clearly applied to spectators' memorial displays:

> Nor is there any reasonable doubt about the pertinence of the standard to the practice in question; one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations. The display is no part of the evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them. On the jurors' part, that expected response could well seem to be a verdict of guilty, and a sympathetic urge to assuage the grief or rage of survivors with a conviction would be the paradigm of improper consideration.[89]

But he concluded that the issue was whether the risk in each case was unacceptable and declined to embrace a per se rule of inherent prejudice for the presence of memorial buttons in any criminal trial. We agree.

[51] We implicitly concluded in *Iromuanya I* that the wearing of victim memorial buttons by spectators at a criminal proceeding could prejudice a defendant's right to a fair trial. But under the Supreme Court's decision in *Carey v. Musladin*,[90] which overruled the Ninth Circuit's decision, this conduct is not per se inherently prejudicial.[91] That is, this type of spectator conduct is not on the same level as state-sponsored procedures showing a probable deleterious effect on fundamental rights and calling for close judicial scrutiny. Instead, we view the issues as whether the memorial displays rise to the level of creating an unacceptable threat to a fair trial and whether the threat can be cured by the court's admonitions and instructions to juries. Many courts have adopted the "unacceptable risk"

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[89] *Id.*, 549 U.S. at 82-83 (Souter, J., concurring in the judgment).

[90] *Carey, supra* note 72.

[91] See, e.g., *U.S. v. Farmer*, 583 F.3d 131 (2d Cir. 2009).

standard for spectator conduct. They have frequently concluded that spectators' wearing of memorial buttons or shirts did not pose an unacceptable threat to a fair trial, especially when they were worn for only a short period and the trial court stopped the practice shortly after being informed of it.[92]

We disagree with the district court that the evidence indicated the buttons were worn only during jury selection. As stated, in his affidavit in support of a new trial, Iromuanya's counsel stated that sometime on the third day of trial, the court ordered spectators not to wear the buttons. But we agree with other courts that the jurors were likely to have viewed the buttons as signs of grief instead of a collective call for Iromuanya's conviction. And the record does show that spectators only wore the buttons for the first 2 to 3 days of a 9-day trial. Also, at the hearing for a new trial, Iromuanya's counsel did not dispute the prosecutor's statement that no witnesses had taken the stand while wearing a button. Finally, the court instructed jurors not to allow sympathy or prejudice to influence their verdict. Under these facts, we will not presume juror partiality. We conclude that there is no reasonable probability that the spectators' wearing of memorial buttons created an unacceptable threat to Iromuanya's right to a fair trial.

[52,53] But our conclusion here does not mean that spectators' memorial displays could never reach such a level. To avoid potential prejudice from victim memorial displays, we admonish trial courts to act promptly to protect jurors from even a suspicion of bias or prejudice resulting from spectators' conduct in a criminal trial.[93] After receiving any information that spectators are displaying victim memorials—regardless of whether defense counsel has moved to prohibit such conduct—a trial court should immediately determine, out of the presence of the jury, who, if anyone, is displaying the memorials, and what message, if any, that the displays convey. The

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[92] See *Carey, supra* note 72 (citing cases). Accord, e.g., *People v. Zielesch*, 179 Cal. App. 4th 731, 101 Cal. Rptr. 3d 628 (2009); *Allen v. Com.*, 286 S.W.3d 221 (Ky. 2009); *State v. Lord*, 161 Wash. 2d 276, 165 P.3d 1251 (2007).

[93] See *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988).

court should make a record of its findings and immediately prohibit such conduct. If the court concludes that jurors would have been exposed to the displays, it should inquire of jurors whether the displays would affect their ability to be impartial and admonish them to disregard any displays to which they might have been exposed.

9. Jury Instructions on Attempted Second Degree Murder

(a) Additional Facts

(i) Trial Proceedings

Jury instruction No. 3 set out the elements for attempted second degree murder of Jenkins. The instruction informed jurors that they could find Iromuanya guilty or not guilty and did not have a lesser-included offense.

Jury instruction No. 5 set out the elements for the charge of second degree murder of Cooper. It did have a lesser-included offense of manslaughter and informed jurors that they could find Iromuanya guilty of murder in the second degree, or guilty of manslaughter, or not guilty. If the jury found that the State had failed to prove second degree murder, the instruction stated that it must acquit Iromuanya of that charge and consider the crime of manslaughter.

The manslaughter elements in instruction No. 5 required the State to prove that Iromuanya killed Cooper without malice upon (1) a sudden quarrel or (2) "unintentionally while in the commission of an unlawful act, to wit: recklessly causing bodily injury to Jenna Cooper."

Instruction No. 7 explained the doctrine of transferred intent. It informed jurors that if they found Iromuanya intended to kill Jenkins, the element of intent was satisfied for Cooper even if Iromuanya did not intend to kill her. Instruction No. 10 defined "sudden quarrel" and explained the provocation issues relevant to the charge of manslaughter:

> "Sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control. The phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and

> does not require a physical struggle or other combative corporal contact between [Iromuanya] and Nolan Jenkins. In considering the offense of manslaughter, you should determine whether [Iromuanya] acted under the impulse of sudden passion suddenly aroused which clouded reason and prevented rational action, whether there existed reasonable and adequate provocation to excite the passion of [Iromuanya] and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment, and whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of provocation to the instant of the killing for the passion to subside and reason resume control of the mind. You should determine whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation until the very instant of the act producing death took place.

During the jury's deliberations, jurors sent this question to the court: "Can a 'sudden quarrel' be a consideration when making a decision of not guilty or guilty in the charge of attempted murder in the 2nd degree?" After receiving this question, the court held a teleconference with counsel. Defense counsel agreed with the prosecutor that the jury could not consider a sudden quarrel for attempted second degree murder, and that is how the court instructed the jury.

(ii) Postconviction Proceedings

Iromuanya alleged three claims regarding jury instructions. First, he alleged that trial counsel failed to challenge erroneous jury instructions on the following issues: provocation, sudden quarrel, and transferred intent. Second, he alleged that trial counsel was ineffective in failing to object to the court's erroneous negative response when the jury asked if "sudden quarrel" could be considered for attempted second degree murder. Third, he claimed that trial counsel should have argued that the court should give a self-defense instruction under § 28-1409(4). That statute justifies the use of deadly force

in specified circumstances, including when the actor believes such force is necessary to protect himself from kidnapping. He also claimed that trial counsel should have asserted that self-defense is not mutually exclusive to a sudden quarrel or lack of requisite intent defense.

The court concluded that the jury instructions as a whole, and its response to the jurors' question, correctly stated the law. It stated that jury instruction No. 3 correctly informed jurors that they could find Iromuanya either guilty or not guilty of attempted second degree murder. And it stated that the only charge for which the jurors could consider the sudden quarrel provocation was manslaughter. Regarding the self-defense claim, the court stated that in Iromuanya's direct appeal, we had upheld its decision not to give a self-defense instruction because there was no evidence which would have supported such instruction. So it concluded that trial counsel was not deficient for failing to request the instruction under § 28-1409(4).

(b) Analysis

In this appeal, Iromuanya assigns that the court erred in failing to find that trial counsel was ineffective for failing to (1) properly challenge jury instructions and (2) object to the court's response to the jurors' question during deliberations.

[54,55] Whether a jury instruction is correct presents a question of law.[94] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[95]

Iromuanya argues that the transferred intent instruction and the court's response to the jurors' question precluded the jury from deciding a critical issue: whether Iromuanya "acted intentionally but by the provocation of a sudden quarrel."[96] As noted, the court instructed the jurors that they could not consider a sudden quarrel provocation in deciding Iromuanya's intent for attempted second degree murder of Jenkins. That

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[94] *Thorpe, supra* note 44.

[95] *Id.*

[96] Brief for appellant at 24.

response was correct under the governing law at the time of Iromuanya's trial.

Neb. Rev. Stat. § 28-305(1) (Reissue 2008) provides that "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." In *State v. Jones*,[97] we specifically held that "there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill."

So under *Jones*, the district court correctly instructed the jurors that they could not consider a sudden quarrel provocation in deciding whether Iromuanya was guilty or not guilty of attempted second degree murder for shooting at Jenkins.[98] It is true that we have recently overruled our decision in *Jones* and held that sudden quarrel manslaughter is an intentional killing.[99] But this decision was issued well after Iromuanya's trial and direct appeal. The failure to anticipate a change in existing law does not constitute deficient performance.[100] We conclude that Iromuanya's trial counsel was not ineffective for failing to object to the court's response to the jury.

Instruction No. 10 informed jurors that they should consider whether the conflict between Iromuanya and Jenkins was a sufficient provocation for the charge of manslaughter. Because manslaughter was only a lesser-included offense as to Cooper, the instruction informed the jury that the sudden quarrel provocation was relevant to Iromuanya's killing of Cooper.

[56,57] We reject Iromuanya's argument that the instructions relieved the State of its burden to prove beyond a reasonable

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[97] *State v. Jones*, 245 Neb. 821, 830, 515 N.W.2d 654, 659 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[98] See, *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002); *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997), *reversed on other grounds* 253 Neb. 357, 570 N.W.2d 713.

[99] See *State v. Smith, ante* p. 720, 806 N.W.2d 383 (2011).

[100] See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

doubt that the attempt to cause death was not committed during a sudden quarrel provocation. Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged.[101] Here, the instruction for attempted second degree murder of Jenkins informed the jury that the State had to prove Iromuanya's intent to kill beyond a reasonable doubt. The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed.[102] If the jurors had believed that Iromuanya did not intend to kill Jenkins, the instructions required them to find him not guilty of attempted second degree murder.

We also reject Iromuanya's claim that his trial counsel was ineffective in failing to argue that the court should give a self-defense instruction under § 28-1409(4). We quoted this statute in *Iromuanya I* and concluded that there was no circumstance "reflected in the record [that] would warrant a reasonable or good faith belief in the necessity of using deadly force."[103]

[58] Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.[104] We conclude that Iromuanya's trial counsel was not ineffective for failing to object to the jury instructions.

10. Closing Arguments

Iromuanya contends that trial counsel failed to present a coherent and comprehensible closing argument. He alleged that trial counsel failed to argue that the shooting occurred during a sudden quarrel, despite evidence to support that theory. He further alleged that trial counsel never explained what crime served as the predicate act for manslaughter committed unintentionally during the commission of an unlawful act. And he

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[101] See *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[102] See, *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated and remanded on other grounds* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[103] *Iromuanya I, supra* note 1, 272 Neb. at 208, 719 N.W.2d at 290.

[104] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

claimed that trial counsel's argument that the only appropriate crime for conviction was involuntary manslaughter was improper and confusing for the following reasons: (1) The jury instructions did not permit the jurors to convict for involuntary manslaughter; (2) "involuntary" was not defined for jurors, so the term was both confusing and contrary to the evidence; and (3) sudden quarrel was the more appropriate manslaughter argument.

Iromuanya also claimed that trial counsel improperly injected race into closing arguments by asking jurors if they would have been frightened if they had been the only white person there with 20 black people encroaching: "It scares the shit out of me, I'm not going to kid you. I'm sorry, Lucky, but that puts a little bit of fear into me." Iromuanya is African-American.

The court concluded that any alleged deficiencies in trial counsel's closing argument did not prejudice Iromuanya because the jury found him guilty of second degree murder. It stated that a sudden quarrel is only relevant to manslaughter. It further found that trial counsel's discussion of race was a reasonable strategic decision to get jurors to put themselves in Iromuanya's place and understand his fear.

[59] "The Constitution prohibits racially biased prosecutorial arguments."[105] But defense counsel's reference to race here was legitimate and obviously distinguishable from the prosecutor's appeal to racial prejudices in the case on which Iromuanya relies.[106] Iromuanya had the burden to allege that trial counsel's closing argument was deficient and prejudiced his defense.[107] We agree that trial counsel's discussion of race in closing arguments was a reasonable attempt to get jurors to view the evidence from Iromuanya's perspective and not ineffective assistance.

Further, as discussed above, because the jurors concluded that Iromuanya intended to kill Jenkins, that intent necessarily transferred to his killing of Cooper under the doctrine of

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[105] *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *U.S. v. Doe*, 903 F.2d 16 (D.C. Cir. 1990).

[106] See *State v. Rogan*, 91 Haw. 405, 984 P.2d 1231 (1999).

[107] See *McGhee, supra* note 2.

transferred intent. Trial counsel was not ineffective for failing to argue otherwise. For the same reason, Iromuanya cannot show prejudice from counsel's failure to better explain involuntary manslaughter in closing arguments.

It is true that trial counsel could have argued that according to Iromuanya's statement, the predicate act for Iromuanya's unintentional killing of Cooper was his unlawful shooting at Jenkins to scare him away. But even if trial counsel had better explained involuntary manslaughter, the result would not have been different. Because the jurors found that Iromuanya intended to kill Jenkins, that intent transferred to his killing of Cooper. Because his intent transferred, there was no basis for finding that he killed Cooper unintentionally.

V. CONCLUSION

The district court did not err in dismissing Iromuanya's motion for postconviction relief without an evidentiary hearing. For all of his claims, Iromuanya has either failed to allege facts that show his counsel's deficient performance or failed to allege facts that show he was prejudiced by his counsel's alleged deficiencies.

AFFIRMED.

JENNIFER BASSINGER, APPELLEE AND CROSS-APPELLANT,
v. NEBRASKA HEART HOSPITAL, APPELLANT
AND CROSS-APPELLEE.
806 N.W.2d 395

Filed December 9, 2011. No. S-10-653.

1. **Workers' Compensation: Appeal and Error.** On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Courts: Appeal and Error.** An appellate court independently decides questions of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments.** The interpretation and meaning of a prior opinion present a question of law.
5. **Courts: Appeal and Error.** Generally, when a party raises an issue for the first time in an appellate court, the court will disregard it because a lower court