ORIGINAL (e-filed)

20080235

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Freeman P. Koropatnicki, Petitioner & Appellant,	)	Supreme Court No. 20080235
v.	)	Stutsman County District Court No. 47-05-K-0186
State of North Dakota, Respondent & Appellee,	)	

APPELLEE'S BRIEF

Appeal from the
Order Denying Amended Application for Post-Conviction Relief
Dated August 4, 2008,
by the Honorable John E. Greenwood
Judge of the Southeast District Court

Jay Schmitz (ID # 05705)
Assistant State's Attorney, Stutsman County
511 Second Avenue Southeast
Jamestown, ND 58401
(701) 252-6688

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PARAGRAPH

STATUTES AND RULES:

ISSUES PRESENTED

1. Whether the District Court's finding of fact that defendant Freeman Koropatnicki's testimony regarding the alleged errors of his trial counsel was not credible is clearly erroneous?

2. Whether the defendant has met his burden of showing a reasonable probability that but for the alleged errors of his trial counsel, the jury would have acquitted him of the charge of terrorizing Aaron Nogosek?

3. Whether the District Court's finding of fact that the defendant consented to dismissal of the direct appeal after consultation with appellate counsel is clearly erroneous?

4. Whether the defendant has met his burden of showing that he received ineffective assistance from his counsel in the post-conviction relief proceeding?

5. Whether the defendant has shown any basis for requiring the trial judge to disqualify himself on the basis of lack of impartiality?

STATEMENT OF THE CASE
AND
STATEMENT OF FACTS

6. Statement of the Case: The State will join appellant/defendant Freeman Koropatnicki's Statement of the Case.

7. Statement of Facts: The State supplements the defendant's Statement of Facts as follows:

8. Freeman Koropatnicki was charged with terrorizing his ex-wife, Nicole Schumacher (File No. 05-K-182), and with making harassing phone calls to her (File No. 05-K-181). He was also charged with terrorizing his ex-wife's friend, Aaron Nogosek (File No. 05-K-186). The cases were consolidated for jury trial, which was held in October 2005. The defendant was acquitted of terrorizing his ex-wife, but convicted of the harassment charge and of terrorizing Nogosek. In December 2005, the defendant was sentenced to five years in prison on the terrorizing charge, and 30 days concurrent on the harassment charge.

9. Although the defendant's application for post-conviction relief refers to both convictions, the harassment conviction was not addressed either at the post-conviction hearing or in the defendant's brief. Therefore, the State will only summarize the evidence relating to the conviction for terrorizing Aaron Nogosek.

10. Testimony of Aaron Nogosek: Nogosek testified that Koropatnicki made threats to kill him during telephone conversations in January and February 2005. Nogosek said Koropatnicki first called him on January 3, 2005, and "rambled on for 10 minutes" that

he was going to kill Nogosek because of "some affair with [Koropatnicki's] wife in Oregon or Washington . . and . . [allegedly] I shot him in the back." (Trial transcript ("TT"), p. 76).

11. Nogosek testified another call came "at suppertime" on February 9, 2005. Koropatnicki asked him to come to the Buchanan bar because he knew Nogosek was home, and told Nogosek that his daughter was wearing yellow pajamas. Nogosek said Koropatnicki was "very agitated," that they spoke for about five minutes, and that the call made him "pretty nervous" because his daughter was in fact wearing yellow pajamas. However, Nogosek didn't recall whether Koropatnicki made any threats that night. (TT, p. 77).

12. Nogosek testified that Koropatnicki called again on February 10, 2005, "very agitated," and making threats to "put [Nogosek] in the ground." Nogosek said he "cut that [call] off short." (TT, p. 78). The last call came on February 14 – "it started out pretty much the same, agitated, said he's going to put me in the ground." Nogosek testified that he took the threats seriously – so seriously that he slept with a gun under his mattress. (TT, pp. 78-79).

13. Testimony of Dan Beckley: Beckley testified Koropatnicki came to his farm near Bordulac on "a Sunday in February [13, 2005]," and asked if Beckley knew "Nogosek." (TT, pp. 83-85). Beckley said he knew Eldon Nogosek, who was "about 80 years old," and Aaron Nogosek, with whom had gone to school. Koropatnicki showed him a picture of a man who appeared to be 20-25 years old, which Koropatnicki said had been taken ten years before, and asked if it was Aaron Nogosek. Beckley said he didn't think so,

although he "didn't even know where Aaron was 10 years ago." (TT, p. 85). Koropatnicki said the man had beaten his son up and that he "was going to hunt him down and kill him." (TT, p. 86). On cross-examination, Beckley testified he was certain that Koropatnicki said he was "going to hunt down Aaron Nogosek and kill him." (TT, p. 89). Beckley took the threats seriously and called Nogosek to warn him. (TT, p. 86).

14. Testimony of Freeman Koropatnicki: Koropatnicki testified that he talked to Nogosek on the telephone "one time . . for about an hour and a half." (TT, p. 125). He denied making any threats during that conversation, although he did tell Nogosek "being around my kids . . there aren't going to be no more beatings because [Koropatnicki's son] took a beating. . . I promised [my son] I would find that guy and I'll – I'm going to find him. there's no doubt about it." (TT, p. 126). Koropatnicki insisted that was the only conversation he had with Nogosek, calling Nogosek's testimony that Koropatnicki had called on several occasions "B.S." (TT, p. 127).

15. Koropatnicki admitted that he had gone to Dan Beckley's farm, to showing Beckley a picture of a man that Koropatnicki believed had beaten his son "out in Washington," and to asking Beckley whether the man was Aaron Nogosek. (TT, pp. 129-130). He denied making any direct threats against Nogosek, but did admit that: "I said I'll – I'd love to find this guy and get him." (TT, p. 131).

16. Post-conviction proceeding: The defendant's counsel, Mark Beauchene, limited the evidence and argument presented to the issues of ineffective assistance of trial and appellate counsel. See Appellant's Brief at p. 20. Thus, there was no evidence or

argument on the issues of bias of the judge and/or jury alleged in the defendant's application (and argued in the appellant's brief at pages 33-36).

17. Testimony of Freeman Koropatnicki: Koropatnicki testified that he specifically and repeatedly told his trial counsel, Robert Fleming, to do two things: First, to subpoena cell phone records to show he had spoken to Nogosek at length (thus that he hadn't threatened Nogosek), and tower location records to show that he was nowhere near Buchanan on February 9, 2005, the evening on which Nogosek said Koropatnicki told him to come to the Buchanan bar and also described his daughter's pajamas. Second, to subpoena Josh Lee to testify about Koropatnicki's February 14, 2005, phone conversation with Nogosek. Hearing transcript, p. 47, lines 13-23. [Lee testified that he was nearby when the conversation occurred and that the tone of the conversation seemed to be friendly. (Transcript, pp. 11-12)]. Koropatnicki said Fleming's denials that he had been asked to subpoena the phone records and Josh Lee were "definitely not true" and "a complete lie." Transcript, p. 51, lines 1-7; p. 55, line 22, through p. 56, line 4. The defendant also claimed that he did not learn of Fleming's failure to issue the subpoenas until the day of trial. Koropatnicki's testimony was contradictory on that point, however – he admitted speaking to Lee a few times prior to trial and that Lee told him he had not been subpoenaed and, in fact, that Fleming had never even spoken to Lee. Transcript, pp. 74-75.

18. With regard to his appeal, Koropatnicki said his counsel, William Mackenzie, told him there was no chance of winning on appeal and that a Rule 35 motion for reduction of sentence was a better option. Hearing transcript, p. 31, lines 5-7. Koropatnicki testified

that he objected to dismissing the appeal, but finally agreed because "you're [Mackenzie] the lawyer" and because Mackenzie said he would withdraw as counsel if Koropatnicki wasn't willing to follow his advice. Transcript, p. 36, lines 1-14.

19. Deposition of Robert Fleming: Fleming flatly denied Koropatnicki's claims as to the issuance of subpoenas. Regarding the cell phone/cell tower records, Fleming testified that "I would remember that very specific request [to subpoena such records] if he had made it and he didn't." (Deposition transcript ("DT"), p. 21, line 17, to p. 22, line 1). Fleming was equally adamant with regard to Josh Lee: "[I] don't know who he is. Don't know who he is. . . It's absolutely foreign to me." DT, p. 41, lines 16-21. Fleming said that if he had been told about such a witness, he definitely would have considered it significant and "absolutely" would have talked to Josh Lee. DT, p. 43, line 12. to p. 44, line 18; see also pp. 51-52.

20. Fleming also testified that Koropatnicki never expressed any dissatisfaction with his representation (DT, p. 47), and specifically that he had never accused Fleming of failing to procure exculpatory evidence. DT, p. 48, lines 6-15.

21. Trial Court's Findings: In its Order Denying Amended Application for Post-Conviction Relief ("Order") (Appendix pp. 89-96), the trial court made the following findings of fact on the ineffective assistance of trial counsel claim: (i) "Had the phone records been introduced at the trial they would have supported Nogosek's claim of multiple phone calls and contradicted Koropatnicki's testimony that there was only one phone call. [Therefore] Koropatnicki has failed to show how the result of the trial would have been different had the phone records been introduced into evidence." Order, App. at

92. lines 18-24. (ii) On the alleged failure to subpoena Josh Lee, "the Court finds counsel to be more credible than Koropatnicki", *i.e.*, the trial court believed Robert Fleming's testimony that Koropatnicki never told him that Josh Lee had exculpatory evidence and should be subpoenaed to testify. Order, App. at 93, lines 4-26.

22. Regarding the defendant's allegation that dismissal of the direct appeal of the convictions constituted ineffective assistance by appellate counsel, the trial court found: "It is clear that appellate counsel addressed the merits of an appeal with Koropatnicki, and that counsel did not believe there were issues on which to appeal, and that in the end Koropatnicki agreed to dismiss the appeal after this discussion. Koropatnicki has not shown that it was deficient conduct on the part of appellate counsel that led to dismissal of the appeal. It was a decision made by Koropatnicki after consultation with counsel." Order, App. at 95, line 25, through p. 96, line 5.

LAW AND ARGUMENT

23. Post-conviction relief proceedings are governed by Chapter 29-32.1 of the North Dakota Century Code. Section 29-32.1-01(1) provides: "A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that (a) the conviction was obtained or the sentence imposed in violation of the laws or the Constitution of the United States or the laws or the Constitution of North Dakota." Post-conviction relief is the appropriate remedy for claims of ineffective assistance of counsel. State v. Woehlhoff, 487 N.W.2d 16, 17-18 (1992). The standards applicable to such claims are well-established, and were summarized in Laib v. State, 2005 ND 187, 705 N.W.2d 845:

24. "The Sixth Amendment of the United States Constitution and Article I, §12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. [citations omitted]. In accord with the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective assistance of counsel bears the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. [citations omitted]. The defendant must first overcome the "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight. [citation omitted].

25. "To meet the "prejudice" prong of the Strickland test the defendant carries the heavy burden of establishing a reasonable probability that, but for counsel's errors, the

result of the proceeding would have been different. [citations omitted]. The defendant must prove not only that counsel's assistance was ineffective, but must specify how and where trial counsel was incompetent and the probable different result. [citations omitted]. Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. [citation omitted].

26. "Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. [citations omitted]. Although the issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by this Court, the trial court's findings of fact in a post-conviction relief proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). [citations omitted].

27. "If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed."

[Laib, at ¶¶9-12].

28. THE DEFENDANT HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

29. The defendant's claim of ineffective assistance of trial counsel must be denied for the following reasons: (1) The district court's finding that Koropatnicki's testimony was not credible, and therefore that he had failed to meet his heavy burden of showing

that his trial counsel's performance fell below an objective standard of reasonableness, is not clearly erroneous. (2) The defendant failed to show that he was prejudiced by his trial counsel's alleged failure to introduce the cell phone records.

30. It is well-established that the trial court's findings of fact in a post-conviction relief proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). Greywind v. State, 2004 ND 213 ¶ 13, 689 N.W.2d 390. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made." Heckelsmiller v. State, 2004 ND 191 ¶ 5, 687 N.W.2d 454.

31. With regard to the defendant's allegation that his trial counsel rendered ineffective assistance by failing to subpoena Josh Lee as a witness, the district court found that Koropatnicki had failed to meet his "heavy burden of proving counsel's representation fell below an objective standard of reasonableness" [Laib, 2005 ND 187 ¶ 9] because Koropatnicki's testimony was not credible: "Koropatnicki testified that he instructed his attorney to contact Lee, and that . . . his counsel is lying when he claims he was not told that Lee was a witness who should be called to testify at trial about the call on February 14, 2005. *On this issue the Court finds counsel to be more credible than Koropatnicki.* Koropatnicki's testimony at trial is completely at odds with his present claim regarding the number of phone calls. There is no reason to find him to be more credible on the issue of Lee." Order, App. at 93, lines 16-26 (emphasis added). In short, the district court chose to believe the testimony of Robert Fleming that "[I] don't know

who [Josh Lee] is. Don't know who he is. . . It's absolutely foreign to me." (Depo. Transcript, p. 41, lines 16-21). On credibility issues, this Court "recognize[s] the district court is in a superior position to weigh a witness's credibility and we resolve conflicts in testimony in favor of affirmance." State v. Salter, 2008 ND 230 ¶ 9.

32. With regard to trial counsel's alleged failure to subpoena and introduce the defendant's cell phone records, the district court found that Koropatnicki had failed to meet his "heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Laib, 2005 ND 187 ¶ 10, *citing* Greywind, 2004 ND 213, ¶ 13; Mathre v. State, 2000 ND 201 ¶ 3, 619 N.W.2d 627. Specifically, the district court finding was that: "Had the phone records been introduced . . . they would have supported [the victim's] claim of multiple phone calls and contradicted Koropatnicki's testimony that there was only one phone call. Koropatnicki has failed to show how the result of the trial would have been different had the phone records been introduced into evidence." Order, App. at 92, lines 18-24. The district court's finding was based in large part on Koropatnicki's lack of credibility (see Order, App. at 93, lines 23-26), which is an issue uniquely within the province of the factfinder. Salter, supra. The finding that the defendant was not prejudiced by the alleged errors of his trial counsel was supported by the evidence and is not clearly erroneous.

33. To the extent that prejudice is a mixed question of law and fact, the question of whether Koropatnicki has met his "heavy burden of proving . . . [he] was prejudiced by counsel's deficient performance" is fully reviewable by this Court. "The prejudice

element requires a defendant to establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different." Heckelsmiller, 2004 ND 191 ¶¶ 3-4. "[T]he prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial." Laib, at ¶ 11, *citing* State v. Steen, 2004 ND 228, ¶ 19, 690 N.W.2d 239. As the district court noted, Koropatnicki testified at trial that he called the victim only one time. See Order, App. at 92, lines 5-17. The cell phone records show that Koropatnicki was lying, but are consistent with the testimony of the victim, Aaron Nogosek, that the defendant called him several times. [The records show Koropatnicki made six calls to Nogosek's home number of 253-5297 (hearing transcript, p. 6, lines 7-16); Appendix at pp. 52, 53, 54, 55, 60, 64]. Nogosek said the phone calls had frightened him to the point that he was sleeping with a gun under his mattress. Nogosek's neighbor, Dan Beckley, testified that Koropatnicki told him he was going to hunt Nogosek down and kill him, and that the conversation was so disturbing that Beckley called Nogosek to warn him. See Statement of Facts, supra, ¶¶ 5-8. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Heckelsmiller, at ¶ 4, *citing* Strickland, 466 U.S. at 694, 104 S.Ct. 2052. The cell phone records do not create a reasonable probability of an acquittal when assessed in light of all the evidence.

34. In his appellate brief, Koropatnicki asserts that trial counsel committed a "fatal error" by putting him on the stand. Brief, p. 31. As with his other allegations, the defendant's credibility on this point is highly questionable; his attorney, Robert Fleming, said Koropatnicki *demanded* to testify: "Freeman made the decision, in no uncertain

terms, he was going to take the stand and . . because of his unique personality I thought maybe that wasn't the best idea. But he was absolutely adamant . . . and that's his decision, so we put him up. I think I told him what the dangers were . . . he's very high-strung and he speaks very quickly. And he swears repetitively ." (Depo. transcript. p. 18, lines 1-14). Given the defendant's credibility deficit, there is no basis to disbelieve Mr. Fleming's testimony nor to believe that the decision to put Koropatnicki on the stand was outside "the wide range of reasonable professional assistance." Laib, at ¶ 10.

35. THE DEFENDANT HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

36. The defendant's claim of ineffective assistance of appellate counsel must be denied for the following reasons: (1) The district court's finding that Koropatnicki agreed to dismissal of his direct appeal after consultation with counsel is not clearly erroneous, and therefore his claim of ineffective assistance fails as a matter of law under the standards of Whiteman v. State, 2002 ND 77, 643 N.W2d 704. (2) The defendant failed to show he was prejudiced by the dismissal of the direct appeal because it is not reasonably probable that the ground on which the defendant wanted to base the appeal, sufficiency of the evidence, would have resulted in reversal of his conviction.

37. The district court's finding of fact on Koropatnicki's claim of ineffective assistance of appellate counsel was as follows: "It is clear that appellate counsel addressed the merits of an appeal with Koropatnicki, and that counsel did not believe there were issues on which to appeal, and that in the end Koropatnicki agreed to dismiss the appeal after this discussion. Koropatnicki has not shown that it was deficient conduct

on the part of appellate counsel that led to dismissal of the appeal. It was a decision made by Koropatnicki after consultation with counsel." Order, App. at 95, line 25, to p. 96, line 5. That finding is not clearly erroneous. Koropatnicki testified that he discussed the merits of an appeal with his counsel, William Mackenzie, "a couple times"; that he told Mackenzie he wanted to appeal in order to "prove with the transcripts that every one of these people lied under oath"; and that Mackenzie said he had read the trial transcript and found no likely ground for appeal, and therefore a Rule 35 motion for reduction of sentence was a better option. Hearing transcript, pp. 30-31. As to whether he agreed to dismiss the appeal, Koropatnicki testified: "I never agreed to anything. I wanted it [the appeal]. I argued with Mackenzie about it and he said he'd hang up" – but then admitted to telling Mackenzie: "I said you're the lawyer. I mean he's going to hang up on me if I don't agree with him so I went along with it [dismissal]." Transcript, p. 36, lines 1-12. The trial court's finding that "in the end Koropatnicki agreed to dismiss the appeal after this discussion [with counsel]" is supported by the evidence. A reviewing court can disregard findings of fact only if it has a "definite and firm conviction that a mistake has been made." and therefore the district court's conclusion is not clearly erroneous. Heckelsmiller, 2004 ND 191 at ¶ 5.

38. If the district court's finding is not clearly erroneous, Koropatnicki's claim of ineffective assistance of appellate counsel fails as a matter of law under the decision in Whiteman v. State, 2002 ND 77. 643 N.W2d 704. Whiteman adopted the U.S. Supreme Court's analysis in Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), where the "question presented [was]: Is counsel deficient for not [pursuing an]

appeal when the defendant has not clearly conveyed his wishes one way or another?" Flores-Ortega, 528 U.S. at 477, 120 S.Ct. 1029; Whiteman, 2002 ND 77, ¶11, 643 N.W2d at 708. The applicable rule in such cases is: "If counsel has consulted with the defendant, 'counsel performs in a professionally unreasonable manner *only by failing to follow the defendant's express instructions* with respect to an appeal'." Whiteman at ¶11; Flores-Ortega, 528 U.S. at 478 (emphasis added). In this case, Mr. Mackenzie reviewed the trial transcript, formed the opinion that there were no issues that would result in a reversal on appeal, and advised his client that a Rule 35 motion was a better option. As discussed more fully below, counsel's opinion that an appeal would be futile was well-founded; in any event, it was not "so deficient as to fall below an objective standard of reasonableness." Ernst v. State, 2004 ND 152 ¶ 9, 683 N.W.2d 891. Therefore, since it is undisputed that counsel consulted with Koropatnicki, and the district court's finding that counsel did not have "express instructions" from Koropatnicki to pursue the appeal is not clearly erroneous, the Flores-Ortega and Whiteman cases hold that Mackenzie's performance as appellate counsel was *not* "professionally unreasonable" as a matter of law.

39. Finally, Koropatnicki cannot demonstrate prejudice from dismissal of his appeal because there is no reasonable probability that it would have succeeded. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Heckelsmiller, 2004 ND 191 ¶ 4. The defendant has made clear both at the hearing (see transcript, p. 30, lines 20-25) and in his brief (pp. 21-24) that he wanted to appeal on the

ground of insufficiency of the State's evidence. The standard of review in such cases is not favorable to appellants:

> "When reviewing challenges to the sufficiency of evidence at trial, this Court draws all inferences in favor of the verdict. [citation omitted]. This Court will reverse a criminal conviction "only if, after viewing the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict, no rational factfinder could have found the defendant guilty beyond a reasonable doubt." [citation omitted]. In its review, this Court will not weigh conflicting evidence or judge the credibility of witnesses." State v. Bitz, 2008 ND 202 ¶7, 757 N.W.2d 565.

40. Given these standards, appellate counsel's opinion that Koropatnicki's appeal would have been futile is certainly entitled to the "strong presumption" that it "fell within the wide range of reasonable professional assistance." Laib, 2005 ND 187 ¶9. Since this Court would not have reviewed the credibility of the victim and the other State witnesses (see Statement of Facts, supra, ¶¶ 5-8), it would not have ruled the jury acted irrationally in finding the State had proven its case beyond a reasonable doubt. Therefore, it is not reasonably probable that the defendant's convictions would have been reversed on appeal.

41. THERE IS NO EVIDENCE TO SUPPORT THE DEFENDANT'S CLAIMS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN HIS POST-CONVICTION RELIEF PROCEEDINGS

42. Koropatnicki claims that his counsel in the post-conviction proceeding, Mark Beauchene, also was ineffective because (1) he failed to call the defendant's son, Kasey,

and a Lee Allen to testify at the hearing, and to introduce a letter from Koropatnicki's mother (Brief, p. 20), and (2) he failed to pursue the "juror bias" and "judicial bias" allegations in the application for relief. Brief, p. 20. The substance of his son's testimony is set forth at pages 26-27 of the appellant's brief – basically, that Aaron Nogosek frequently visited the home of Koropatnicki's ex-wife, and his son did not like Nogosek. There is no offer of proof as to what Lee Allen's testimony would have been. "A defendant must offer evidence that any additional witnesses would have aided the defense's claim." Damron v. State, 2003 ND 102 ¶16, 663 N.W.2d 650. The defendant has not shown how Beauchene's decision not to call these witnesses was error. Kasey's testimony does not appear to be relevant to whether Koropatnicki made terrorizing phone calls to Nogosek, and there is no proof that Koropatnicki asked his trial counsel, Robert Fleming. to subpoena either witness for trial. Hence, he cannot establish he was prejudiced by Beauchene's alleged error in failing to call them to testify at the post-conviction hearing, i.e., Koropatnicki has not demonstrated a "reasonable probability" that the witnesses' testimony would have undermined confidence in the defendant's conviction for terrorizing. Heckelsmiller, 2004 ND 191 ¶ 4. As for the letter from Koropatnicki's mother, it would have been hearsay and inadmissible at the hearing.

43. Koropatnicki cannot meet his heavy burden of showing that Beauchene's decision not to pursue the "juror bias" allegation was objectively unreasonable (Greywind. 2004 ND 213, ¶ 13), because Beauchene made the decision after inquiring into the issue at the deposition of trial counsel, Robert Fleming. Fleming testified that he remembered Koropatnicki telling him that a prospective juror was a co-worker of

Koropatnicki's ex-wife's boyfriend; that he inquired with the juror during voir dire, and the juror denied knowing any of the parties involved; and that therefore Fleming had no basis on which to challenge the juror for bias. Depo. transcript, p. 48, line 12, to p. 49, line 21. Hence, the record affirmatively demonstrates that both Fleming and Beauchene acted appropriately to address the question of juror bias.

44. Similarly, Beauchene acted reasonably in deciding not to pursue the allegation that the trial judge was guilty of "judicial bias." Koropatnicki's only "proof" of this bias is a statement in his Brief that the judge "had sat on many cases involving Koropatnicki and/or his ex-wife." (See pp. 35-36). The defendant is correct that Judicial Canon 3(E)(1) says a judge should recuse himself when his impartiality might reasonably be questioned. However, "the law presumes a judge is unbiased and not prejudiced." Farm Credit Bank v. Brakke, 512 N.W.2d 718, 720 (N.D. 1994). "The appearance of partiality test is one of reasonableness. Although it has been said that judges should err on the side of caution and always disqualify themselves in cases raising "close questions," recusal is not required in response to spurious or vague charges of partiality." Id. at 721. In Brakke, this Court held that the trial judge was not obligated to recuse herself even though the Brakkes had named her as a defendant in another lawsuit. Id. at 721. Koropatnicki does not cite even one example of biased words or actions by the trial judge, and therefore the decisions of Mr. Mackenzie and Mr. Beauchene not to pursue that allegation either on direct appeal or in post-conviction proceedings was well "within the wide range of reasonable professional assistance." Laib, 2005 ND 187 ¶9.

CONCLUSION

45. For the foregoing reasons, plaintiff and appellee State of North Dakota respectfully requests that the Court affirm the district court's Order Denying Amended Application for Post-Conviction Relief.

RESPECTFULLY SUBMITTED this 9th day of January, 2009.

STUTSMAN COUNTY STATE'S ATTORNEY OFFICE
Attorneys for Appellee
511 2nd Avenue SE
Jamestown, ND 58401
(701) 252-6688

Signed: JAY A. SCHMITZ
Assistant State's Attorney (ID# 05705)

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay A. Schmitz, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 8th day of January, 2009, the affiant caused the Appellee's Brief in the matter of Freeman P. Koropatnicki v. State of North Dakota to be filed electronically with the Clerk of the North Dakota Supreme Court by attaching the computer file containing said Brief to an e-mail transmission sent to the following address:

supclerkofcourt@ndcourts.com

That the Appellee's Brief was served by first-class mail on petitioner and appellant Freeman P. Koropatnicki by mailing a copy thereof to the appellant's last-known address. as follows:

Freeman P. Koropatnicki
North Dakota State Penitentiary
P.O. Box 5521
Bismarck, ND 58506-5521

That to the best of the affiant's knowledge, information and belief. such addresses as given above is the actual mailing address of the party intended to be served.

Signed: Jay A. Schmitz
Jay A. Schmitz

SUBSCRIBED and SWORN to before me this 8th day of January, 2009.

Signed: Cynthia A. Holzkamm
NOTARY PUBLIC
My Commission Expires: 2-17-2010

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay A. Schmitz, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 9th day of January, 2009, the affiant caused the Appellee's Brief in the matter of Freeman P. Koropatnicki v. State of North Dakota to be filed electronically with the Clerk of the North Dakota Supreme Court by attaching the computer file containing said Brief to an e-mail transmission sent to the following address:

supclerkofcourt@ndcourts.com

That the Appellee's Brief was served by first-class mail on petitioner and appellant Freeman P. Koropatnicki by mailing a copy thereof to the appellant's last-known address, as follows:

Freeman P. Koropatnicki
North Dakota State Penitentiary
P.O. Box 5521
Bismarck, ND 58506-5521

That to the best of the affiant's knowledge, information and belief, such addresses as given above is the actual mailing address of the party intended to be served.

Signed: Jay A. Schmitz
Jay A. Schmitz

SUBSCRIBED and SWORN to before me this 9th day of January, 2009.

Signed: Cynthia A. Holzkamm
NOTARY PUBLIC
My Commission Expires: 2-17-2010