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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0385**

Darrel Tantra Joseph, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 31, 2009
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-06-027197

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this postconviction appeal, appellant challenges the postconviction court's denial of his motion to withdraw his guilty plea or, in the alternative, vacate his conviction for second-degree assault. Appellant argues that the postconviction court abused its discretion because (1) his plea was not accurate, voluntary, and intelligent, (2) he was not informed of the immigration consequences of his conviction, and (3) he received ineffective assistance of counsel. We affirm.

FACTS

Appellant Darrel Tantra Joseph is a native of Antigua and a permanent resident of the United States. On April 21, 2006, officers from the Minneapolis Police Department heard screaming from the area of Columbus Avenue and Lake Street and saw several females running toward them. The females stated that a man had assaulted a woman at a nearby beauty shop with a knife. The officers observed a man running from the location, and one of the females stated, "That's him." The officers noticed that the man had a large knife, which he tried to conceal in his right sleeve. After the officers ordered the man "a few times" to drop the knife, he did and the officers identified him as Joseph. Joseph also had another knife in his waistband.

The victim of the assault was a woman, T.J., who explained that the previous night, she had been in an argument with Joseph's wife at a nightclub. The following morning, Joseph entered her beauty shop and warned her to leave his wife alone. T.J. stated that when she told Joseph that his wife had instigated the altercation, he pulled out

a machete and began swinging it at her neck. When T.J. ducked, the machete hit her above the right eye, causing swelling and a cut. The woman whose hair T.J. was working on at that time was also struck in the face by the machete. A police officer took the statement of the beauty-shop customer, who confirmed that she was also assaulted by Joseph. Other witnesses confirmed Joseph's assaultive behavior, and the officers took photographs of the victims' injuries and of the damage to the beauty-shop chair in which T.J.'s customer had been sitting when assaulted. After Joseph was placed in a squad car, T.J.'s customer looked at him through the window and he apologized, stating that he had not intended to hurt anyone else but "her," referring to T.J.

Joseph was charged with two counts of second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2004), and was conditionally released from custody. His conditional release was revoked because he was charged with two counts of criminal sexual conduct in Ramsey County. These charges were later dismissed. In June 2006 Joseph pleaded not guilty to both counts of second-degree assault with a dangerous weapon. In October 2006, pursuant to a plea agreement, Joseph withdrew his not-guilty plea and pleaded guilty to one count of second-degree assault with a dangerous weapon in exchange for a sentence of 21 months' imprisonment and dismissal of the other count of second-degree assault with a dangerous weapon. Joseph was sentenced in January 2007. As a result of his conviction, Joseph is subject to deportation proceedings and claims that he will be deported.

Joseph filed his petition for postconviction relief in November 2007, seeking to withdraw his guilty plea or, in the alternative, vacate his conviction. He argued that he

was innocent of the charges, his plea was not supported by an adequate factual basis, and he received ineffective assistance of counsel. The district court denied Joseph's petition. This appeal follows.

DECISION

I.

Appellate courts “review a postconviction court’s findings to determine whether there is sufficient evidentiary support in the record” and “afford great deference to a district court’s findings of fact and will not reverse the findings unless they are clearly erroneous.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review a postconviction court’s decisions for abuse of discretion except for legal determinations, which we review de novo. *Schleicher v. State*, 718 N.W.2d 440, 444-45 (Minn. 2006).

A defendant does not have an absolute right to withdraw a guilty plea, *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997), but a district court shall allow a defendant to withdraw a plea if it is necessary to correct a manifest injustice, Minn. R. Crim. P. 15.05, subd. 1. The burden is on the defendant to demonstrate that the refusal to allow him to withdraw his plea is manifestly unjust. *State v. Christopherson*, 644 N.W.2d 507, 510 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). If a defendant is allowed to withdraw a plea after sentence, the court shall set aside the judgment and the plea. *Id.* Manifest injustice exists when a defendant meets his burden of proving that a plea was not “accurate, voluntary, and intelligent (i.e., knowingly and understandingly made).” *Perkins*, 559 N.W.2d at 688. The requirement that a plea be intelligent ensures that “the defendant understands the charges, the rights being waived, and the consequences of the

guilty plea.” *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). The requirement that a plea be voluntary ensures that it is not made “in response to improper pressures or inducements.” *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). To be accurate, a plea must be supported by an adequate factual basis, which ensures that the defendant does not plead guilty to a more serious charge than he could be convicted of at trial. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Joseph first argues that his defense counsel misled him about his rights to a jury trial. He cites his defense counsel’s affidavit, but this affidavit contains no references to any communication that counsel had with Joseph regarding his right to a jury trial. Moreover, the plea transcript shows that Joseph was specifically asked whether he understood that he was giving up his right to a jury trial by pleading guilty, and he answered, “Yes.” Joseph provides no evidence supporting his assertion that his defense counsel misled him about his rights to a jury trial, and his claim fails for lack of support.

Joseph also argues that when he entered his guilty plea in Hennepin County, he was misled by the prosecutor, his defense counsel, and the district court to believe that he had already been convicted of the two Ramsey County criminal sexual conduct charges. He asserts that “it is obvious from the exchange during the plea hearing between the court, the State prosecutor and defense counsel that the parties [had] already concluded that [Joseph] was already convicted or would be convicted in Ramsey County.” Joseph also states that his defense counsel warned him that if he went to trial, he would be convicted of two counts of second-degree assault and would have to serve the sentences consecutively. A plea is not voluntary when the defendant pleads guilty because of

improper pressures or inducements, *Alanis*, 583 N.W.2d at 577, and a defendant has a “right . . . to be protected from improvident plea bargaining,” *State v. Johnson*, 279 Minn. 209, 214, 156 N.W.2d 218, 222 (1968). Joseph cites *State v. DeZeler*, 427 N.W.2d 231, 234 (Minn. 1988), for the proposition that a defendant should be permitted to withdraw a plea bargain that was entered into on the ground of mutual mistake.

At the plea hearing, the following colloquy occurred:

PROSECUTION: The Court has agreed, over the State’s objection, to delay the sentencing until after [Joseph] has a trial in Ramsey County on a pending Criminal Sexual Conduct case that *either he will be acquitted and we will come back, or he will be convicted and we’ll come back for sentencing*. It’s everyone’s clear understanding that the sentencing in this case will take place after that trial, but before the sentencing in that matter, if convicted.

DISTRICT COURT: All right. I’m a little confused, because I thought part of your offer . . . was that this case would run concurrent with the Ramsey County and that we were continuing the sentencing in order to make that possible.

PROSECUTION: That is not Ramsey County’s position. They will not proceed with their sentencing until ours is sentenced, because ours is first in time, if he were to be convicted there, and they have made that clear to me and I have made that clear to [defense counsel]. I think [defense counsel’s] position . . . is that he just wanted to know the 21 months being imposed in this case was a result of this case and not Ramsey County, if, in fact, he was acquitted. It should be made clear, and that’s why I put it on the record, that it is certainly Ramsey County’s intent, unless there’s a negotiated resolution in that case to the contrary, if that case goes to trial they intend to sentence after sentencing in this case. This case happened first in time, and I imagine they will ask for consecutive sentences if they are in a position where they go to trial and obtain a conviction.

. . . .

DISTRICT COURT: The only reason I see for postponing the sentence is if they are going to run concurrent. I don’t understand why we would postpone it otherwise.

DEFENSE COUNSEL: Your Honor, [Joseph] is concerned that this case is—I think I have used the term—coloring this case. So he wants to have a resolution to his Ramsey County case before he is sentenced in this case. If—

DISTRICT COURT: The only way you can do that is if there's an interim commit, because the jail here cannot accommodate sentencing months after the plea. . . .

. . . .

DEFENSE COUNSEL: [Joseph] understands that the sentence isn't going to change in this case, and would prefer to wait on the sentencing, Your Honor.

PROSECUTION: Quite frankly, Your Honor, I have no real problem with that, if the Court is okay with that, as long as [Joseph] understands he will go for 21 months and he will be sentenced before that. I suppose if between now and then it doesn't go to trial and there's a negotiated resolution . . . that involves concurrent time or consecutive on different numbers in Ramsey County, who knows how that will play out, we could come back and have a sentencing. If the Court doesn't have a problem waiting, I guess I don't as long as that's clear then that we're looking at a consecutive sentence in Ramsey County for this offense.

DISTRICT COURT: All right. *And it should also be very clear that the sentence in this case is going to be 21 commit regardless of what happens in Ramsey County.*

DEFENSE COUNSEL: *He understands that Judge.*

DISTRICT COURT: All right. Let's arraign.

(Emphasis added.)

Contrary to Joseph's arguments and assertions, the above colloquy does not reveal that "the parties [had] already concluded that [Joseph] was already convicted or would be convicted in Ramsey County." The emphasized portions of the transcript clearly reveal that Joseph was made aware that his sentence on his conviction of second-degree assault would be 21 months' imprisonment regardless of what happened on his Ramsey County charges. And the above colloquy contradicts Joseph's claim that his defense counsel warned him that if he went to trial, he would be convicted of two counts of second-degree

assault and would have to serve the sentences consecutively. Joseph's claim that his plea agreement was entered into on the basis of a mutual mistake or a presumption that he would be convicted on the Ramsey County charges is not supported by the record.

Joseph also maintains that he repeatedly asserted his innocence to his defense counsel prior to entering his guilty plea and that his defense counsel used "intimidation, scare tactics, and threats of serving 42 months in prison to get him to plead guilty." Joseph states that his defense counsel told him that, because of the charges filed against him in Ramsey County, the prosecutor refused to amend the charge of second-degree assault to fifth-degree assault and that the prosecutor told defense counsel and the district court that he considered the Ramsey County charges to be a "slam dunk." In fact, in his affidavit to the district court, Joseph's defense counsel states that "[t]he existence of the Ramsey County charge was extremely unhelpful in the negotiations with prosecutor." The following colloquy occurred between Joseph and his defense counsel at the plea hearing:

DEFENSE COUNSEL: Mr. Joseph, I'm showing you a petition to enter a plea of guilty. It's a two-page double-sided document, and we went over this just recently, correct?

JOSEPH: Yes

DEFENSE COUNSEL: And I have explained the contents of this petition to you line by line?

JOSEPH: Yes, you did.

DEFENSE COUNSEL: So I have explained all of your Constitutional rights in this case, correct?

JOSEPH: Yes.

DEFENSE COUNSEL: So you understand by entering into a plea agreement today that you are giving up some constitutional rights?

JOSEPH: Yes, sir.

DEFENSE COUNSEL: And most importantly your right to have a jury trial in this case?

JOSEPH: Yes.

DEFENSE COUNSEL: And so, by entering into this plea agreement you are giving up those rights and you have had sufficient time to discuss the case with me?

JOSEPH: Yes, sir.

DEFENSE COUNSEL: And so you are satisfied that I fully informed you of all the facts and the possible defenses you may have had?

JOSEPH: Yes.

DEFENSE COUNSEL: And is this your signature on each page?

JOSEPH: Yes, that's my signature.

DEFENSE COUNSEL: I would offer the petition , Your Honor.

DISTRICT COURT: Petition will be received. Do you have any questions about this for me, Mr. Joseph?

JOSEPH: No, I don't.

The above colloquy reflects that, pursuant to the plea agreement, Joseph voluntarily pleaded guilty to the charged offense of second-degree assault with a dangerous weapon, he did not maintain his innocence, and he was not coerced into pleading guilty. *See Ecker*, 524 N.W.2d at 719 (rejecting a defendant's argument that his plea was involuntary when the record showed that he failed at his plea hearing to assert his innocence or allege that he was intimidated, and stated that his plea was his own decision); *State v. Propotnik*, 299 Minn. 56, 58, 216 N.W.2d 637, 638 (1974) (concluding that where "the record includes a copy of the petition to enter a plea of guilty which defendant had signed and which he admitted reading and understanding," the plea was voluntary and intelligent).

Joseph also argues that he did not admit to having the specific intent to hurt anyone and that he thought he was pleading guilty to possession of a dangerous weapon,

i.e., the machete. The elements of second-degree assault are (1) the defendant committed an assault, and (2) the defendant used a deadly weapon in the assault. Minn. Stat. § 609.222 (2004); *see also 10 Minnesota Practice*, CRIMJIG 13.01 (2006) (defining assault to include “an act done with intent to cause fear in another person of immediate bodily harm or death”); CRIMJIG 13.10 (defining second-degree assault as assault in which a deadly weapon was used). And “an act done with intent to cause fear in another of immediate bodily harm” satisfies the definition of “assault.” Minn. Stat. § 609.02, subd. 10 (2004). In its order denying Joseph’s petition for postconviction relief, the district court acknowledged that Joseph “was not asked specifically about his intent,” but cited CRIMJIG 3.05 for the proposition that his intent could be inferred from the actions to which Joseph admitted. *See* CRIMJIG 3.05 (providing that a fact can be proven by circumstantial evidence “when its existence can be reasonably inferred from other facts proven in the case.”). A conviction of second-degree assault does not require the defendant to specifically testify that he intended to hurt someone. The district court properly rejected Joseph’s argument.

Joseph also argues that his testimony at the plea hearing came in the form of answers to leading questions. Although the district court need not interrogate the defendant, the court must “ensure that an adequate factual basis has been established in the record.” *Ecker*, 524 N.W.2d at 716. “The trial judge must be particularly attentive to situations in which a defendant is pleading guilty and is asked only leading questions by counsel.” *Id.* Although the use of leading questions is discouraged, reversal is not appropriate if “the record supports the conclusion that the defendant committed an

offense at least as serious as the crime to which he is pleading guilty.” *Lundin v. State*, 430 N.W.2d 675, 679 (Minn. App. 1988), *review denied* (Minn. Dec. 21, 1988). Joseph’s answers to the questions at his plea hearing establish an adequate factual basis for his conviction of second-degree assault, as does the rest of the record. The record reveals that multiple persons witnessed Joseph’s assault, police officers saw Joseph running from the scene of the assault with a large knife in his possession, and the officers reported that after his arrest, Joseph stated that he intended to hurt T.J., but not T.J.’s beauty-shop customer. On these facts, allowing Joseph to withdraw his plea on the grounds that his testimony was in the form of answers to leading questions is inappropriate.

II.

Joseph also argues that he should be allowed to withdraw his plea because his defense counsel misled him about the immigration consequences of his plea. The failure to advise a defendant of the immigration consequences of pleading guilty implicates the intelligent nature required of a guilty plea. *See Alanis*, 583 N.W.2d at 578 (considering the failure to advise a defendant of the immigration consequences of pleading guilty as a question of whether the guilty plea was intelligent). The district court rejected this claim without holding an evidentiary hearing. Whether an evidentiary hearing should be held depends on whether the petitioner alleges facts that “if proved, would entitle a petitioner to the requested relief.” *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). The petitioner bears the burden of establishing the facts alleged in the petition by “a fair preponderance of the evidence.” *Powers v. State*, 695 N.W.2d 371, 373-74 (Minn. 2005). In deciding whether to hold an evidentiary hearing, a postconviction court must evaluate

whether, “in light of the significance of the claimed error and the evidence presented at trial, a petitioner has raised and factually supported material matters that must be resolved in order to decide the postconviction issues on their merits.” *State v. Rhodes*, 627 N.W.2d 74, 88 (Minn. 2001). “[D]oubts concerning whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing. *Id.*”

Joseph argued before the district court that he received incorrect advice from his defense counsel regarding the immigration consequences of his guilty plea. He states that his defense counsel informed him that if he pleaded guilty to the second-degree assault charge, he would serve 14 months of his 21-month sentence and would not be deported. In his affidavit, Joseph’s defense counsel does not corroborate Joseph’s claim—he merely states that “there was no mention on the record of immigration or deportation consequences” at the plea hearing and sentencing. Joseph’s defense counsel’s affidavit contains no evidence, nor does Joseph provide any other evidence, to support Joseph’s claim that he was misled by his defense counsel as to the immigration or deportation consequences of his plea. Joseph’s defense counsel does not address whether he discussed deportation or immigration consequences with Joseph; he merely states in his affidavit that “[Joseph] was not made aware that deportation would be the consequence of his plea.” That Joseph’s defense counsel did not make Joseph aware that deportation “would be the consequence of his plea,” is reasonable. As noted by the *Alanis* court, “[i]t makes sense that deportation is not a direct consequence of the guilty plea because deportation is neither definite, immediate, nor automatic.” 583 N.W.2d at 578. When a defendant enters a guilty plea, no one knows whether deportation is definite, immediate,

or automatic. Although, in a given case, defense counsel may mislead a defendant about the immigration consequences of a guilty plea, in this case, defense counsel disclosed nothing in his affidavit to support Joseph's claim that he gave him incorrect advice about the immigration consequences of his plea.

The district court stated that Joseph's claim that he received incorrect advice regarding the immigration consequences of his guilty plea was "in direct contradiction to Line 27 of the plea petition filed in this matter which states, 'my attorney told me and I understand that if I am not a citizen of the United States, conviction of a crime may result in deportation, exclusion from admission to the U.S.A., or denial of naturalization.'" Citing *Alanis*, the district court added that "even if [Joseph] did not read the petition prior to signing it and was unaware of the immigration consequences of his guilty plea, a defendant may not withdraw his guilty plea based on this fact." After *Alanis* was decided, Minn. R. Crim. P. 15.01 was amended to include possible deportation consequences as one of the matters about which a defendant must be questioned "by the court with the assistance of counsel." Minn. R. Crim. P. 15.01, subd. 1(10)(d) (providing that "[b]efore the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel" about "[w]hether defense counsel has told the defendant and the defendant understands: [t]hat if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as

a United States citizen.”)¹; *see also Kaiser v. State*, 641 N.W.2d 900, 904 n.4 (Minn. 2002).

But the district court’s misplaced reliance on *Alanis* is of no significance in this case because, as revealed by the colloquy at the plea hearing, when defense counsel asked Joseph whether counsel had explained the contents of the plea petition to him line by line, Joseph responded, “Yes, you did.” And, when the district court asked Joseph whether he had any questions about the petition, he said he did not. Thus, the district court did not err in determining at the postconviction hearing that it saw no value in holding an evidentiary hearing because it had Joseph’s affidavit, defense counsel’s affidavit, the plea petition, the plea hearing transcript, and its own recollection of the plea hearing, and that the plea petition and plea hearing transcript “trumps” any party’s recollection of what happened and were superior to “anybody’s memory of the events.” *See Rhodes*, 627 N.W.2d at 88 (stating that a postconviction court is entitled to weigh the evidence presented by a petitioner when determining whether to grant an evidentiary hearing).

We interpret the contents of the district court’s order denying Joseph’s postconviction petition to constitute a finding that Joseph was informed that his plea of guilty to second-degree assault with a dangerous weapon might result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen as a result of defense counsel’s line-by-line explanation of the terms of

¹ The amendment to the rule requiring that a defendant be informed of the deportation consequences of his plea became effective January 1, 1999, as Minn. R. Crim. P. 15.01, subd. 10(c). In 2003, the amendment was renumbered as Minn. R. Crim. P. 15.01 subd. 10(d).

Joseph's plea petition. We will not disturb this finding. *See Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997) (stating that this court will not disturb the district court's findings unless they are without support in the record and are therefore clearly erroneous).

Joseph failed to meet his burden of proof by a preponderance of the evidence that he received incorrect advice from his defense counsel regarding the immigration consequences of his plea, therefore, Joseph is not entitled to postconviction relief or an evidentiary hearing based on this allegation. *See Powers*, 695 N.W.2d at 373-74 (stating that the petitioner bears the burden of establishing the facts alleged in his petition by "a fair preponderance of the evidence.").

III.

Joseph argues that his plea should be withdrawn because he received ineffective assistance from his defense counsel. A defendant may show ineffective assistance of counsel if he pleaded guilty "as a direct consequence of his counsel's erroneous advice and . . . but for this advice, the outcome of the plea process would have been different." *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991). In order to prove ineffective assistance of counsel, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Joseph cites the discussion about the “Ramsey County sentencing” in the plea hearing transcript as evidence that his defense counsel and the district court considered his conviction of the Ramsey County criminal sexual conduct charges to be a foregone conclusion. Joseph argues that his defense counsel violated ethics rules by meeting in chambers with the prosecutor and the district court judge and reaching a “consensus” that Joseph would be convicted of the Ramsey County charges. He complains that his defense counsel was present at that meeting, but “did nothing about it”; that his defense counsel used the Ramsey County charges to coerce him into pleading guilty; and that the charges were irrelevant because he had not yet been convicted and the offenses should not have been mentioned. Joseph states that it is “clearly a violation of the rules of ethics” for his defense counsel and prosecution to discuss the Ramsey County charges “as a basis for a plea agreement” when he had not yet been convicted of the charges. But Joseph cites no legal authority in support of his argument, and it fails.

Joseph argues that his defense counsel misled him about his right to a jury trial, stating that his defense counsel told him the district court said that Joseph’s case “cannot go to trial because no jury will believe that a machete is not a dangerous weapon.” Joseph claims unfamiliarity with the American legal system, being familiar only with the legal system in Antigua where, he claims, the judge decides whether a case will go to trial

or not.² Joseph offers no support for his description of the Antiguan legal system. Furthermore, nothing in the record substantiates Joseph's claim that he was misled about his right to a jury trial, and this claim fails.

Joseph argues that his defense counsel provided ineffective assistance because he made "false and misleading statements" on the plea petition. He first notes that his defense counsel marked that he had not talked with or been treated by a psychiatrist "or other persons" for a "nervous or mental condition," when in fact his defense counsel had sent him to see a psychologist. The state responds to Joseph's argument by pointing out that his presentence investigation report states that Joseph attended only two counseling sessions because of his "high temper," and contains no evidence that Joseph suffers from a nervous or mental condition. Joseph's argument that his defense counsel was ineffective because he made false and misleading statements on the plea petition fails.

Joseph also argues that he was misinformed about the immigration consequences of his plea. We will not repeat our analysis of that issue here. He further argues that he was not informed of his right under the Vienna Convention to contact his foreign consul and that the Antiguan consulate would have been someone he "could have related to culturally and who spoke his native language." Joseph raises this argument for the first time on appeal, and we generally will not consider issues raised for the first time on

² We note that, in fact, the Constitution of Antigua provides that a criminal defendant is entitled to receive a fair, open, and public trial by jury. Antiguan defendants enjoy a presumption of innocence, have timely access to counsel, may confront or question witnesses, and have the right to appeal.

appeal. *Hirt v. State*, 309 Minn. 574, 575, 244 N.W.2d 162, 162 (1976). But we may address such issues as required by the interests of justice and when doing so would not unfairly surprise a party to the appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Article 36 of the Vienna Convention requires that an arrested foreign national be notified that on his request, the authorities shall inform his consular official of his arrest and promptly forward to the consular post any arrestee's communications addressed to the consular post. *Ademodi v. State*, 616 N.W.2d 716, 718 n.3 (Minn. 2000). This court has held that a defendant has the burden of proving that he was prejudiced by a violation of the Vienna Convention. *State v. Miranda*, 622 N.W.2d 353, 356 (Minn. App. 2001). Joseph asserts that a consulate could have assisted him in obtaining "competent counsel," but provides no evidence that his defense counsel was incompetent or that he had any difficulty understanding or communicating with his counsel. As noted by the district court at Joseph's postconviction hearing, Joseph's language is English. Joseph has not met his burden of showing that he was prejudiced by a violation of the Vienna Convention. *See id.* (requiring a defendant to show that a violation of the Vienna Convention would have affected the outcome of the case).

Affirmed.