IN THE COURT OF APPEALS OF IOWA

No. 22-1133
Filed February 21, 2024

RANDY LEROY CUE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Richard H. Davidson, Judge.

Randy Cue appeals the denial of his applications for DNA profiling and postconviction relief. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Brenna Bird, Attorney General, and Thomas J. Ogden, Assistant Attorney General, for appellee.

Considered by Greer, P.J., Chicchelly, J., and Gamble, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2024).

GAMBLE, Senior Judge.

Randy Cue appeals the denial of his applications for postconviction relief and DNA profiling. Cue has not established his trial counsel provided ineffective assistance, and his application for profiling did not meet the requirements for the court to order further DNA testing. We affirm.

I. Background Facts and Proceedings

In September 2010, a jury found Cue guilty of first-degree murder in the March 2008 killing of Rodney Deville. This court affirmed his conviction in 2013. *State v. Cue*, No. 10-1795, 2013 WL 5760572 (Iowa Ct. App. Oct. 23, 2013). We described the evidence as follows:

> At 10 p.m. on March 24, 2008, the appellant [Cue] and his girlfriend Lisa Green entered a house in Council Bluffs where Cue lived with his mother Florence Cue (Florence) and [Deville]. Earlier in the day, Cue and Green had looked at a motorcycle that Cue wished to purchase, and then they went drinking at a few local bars. Cue had just received a Social Security settlement and was in a good mood. At the final bar Green asked the "bartenders to cut Randy off" due to his state of intoxication.
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> When Cue and Green entered the house, they found Florence and Deville sitting in the living room. Both were about to watch a local news broadcast. The four had a brief conversation, first about the potential motorcycle purchase, then about black magic. Deville became annoyed and went to his room.
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> After Deville left, Cue asked Green to go to the Hy-Vee Drug Store and pick up his prescription of Viagra. She refused. Cue then convinced Florence to get his prescription. As she moved to leave the house, Cue grabbed her arm and emphasized the name of his prescription. Green told him to let go of his mother, and Florence left.
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> At this point Cue took off his shoes and Green tried to help. Agitated, Cue threw money at Green and stuffed a few bills in her pants. Green removed the money and tossed it under a chair. Cue grabbed Green's hair and coat collar and walked her to the door. Cue "threw [Green] out the door and slammed the door." Green left the Cue residence and drove home.
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> Minutes after Green left, at 10:19 Deville called Richard Mangan, former employer and friend of Deville and Cue, and told

Mangan, "If you have any control, if you can do anything, give [Cue] a call. You've got to calm him down. He is going crazy. . . . He is turning everything up in the house." Deville hung up. Mangan testified that Deville seemed scared. Mangan called Deville back. During the second call, Deville stated, "you've got to try to do something. I am loading my gun right now," and he hung up.[1] Mangan called Cue's phone number, but the call went to voicemail.

Meanwhile, Florence was unable to obtain Cue's prescription from the pharmacy. At 10:28, Florence called Cue to tell him the news, but her call also went to voicemail. Florence then called Deville twice, at 10:29 and 10:31, and spoke to him for about thirty seconds each time. At trial, she could not remember what they discussed during those calls. Shortly thereafter, at 10:35 Deville placed a call to 911, but could only groan.

Florence arrived home within minutes of Deville's 911 call. As she entered the front door, Cue was leaving the house. Cue asked for the keys and stated "he would be back." Florence handed him the keys to her 1988 Oldsmobile. Florence testified that he seemed drunk as he left the house, but otherwise was normal. After she entered the house, Florence saw Deville kneeling [by] his bed. Florence asked him if he was hurt and touched his shoulders. She testified that he made a growling sound and appeared to be alive. Florence saw blood in the hallway and in Deville's room, and she called 911. She also called Green and asked her to come back to the house, at least until the ambulance arrived. Green, thinking it was a ruse, did not go to the house. Florence paced around the house until the ambulance reached the scene.

After the police entered and secured the house, the paramedics examined Deville. Paramedic Christopher Eichhorn testified that he found Deville in a "praying position" resting on the bed. Eichorn observed that Deville had been stabbed in the abdomen and that there was a large amount of blood on the floor. The medical examiner later testified that "the cause of death was stab wounds of the abdomen and leg."

In the interim, Cue arrived at Louis Bar & Grill in Omaha, Nebraska, where he met his friend Bill Hansen. Paul Miller, the bar manager, testified Cue was belligerent; "[o]bnoxious, loud just kind of calling attention to himself." Miller also noted that Cue had a "knife sticking out of his pants" near the small of his back and was not wearing shoes. Miller stated that at one point he noticed Cue mimicking a "stabbing technique." A waitress at the bar, Tamara Davis, testified she heard Cue tell Hansen he "stabbed the fucker" or "I stabbed him." She noted that he said similar phrases about five other times while he was at the bar. Cue also told Davis directly that

[1] Mangan testified that he had never seen Deville with a gun. The police did not find a gun at the scene.

> she should be scared of him because he "just stabbed someone." Davis did not see Cue's knife, though she saw a "bulge" under his shirt.
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> Cue and Hansen left the bar around 1:00 [a.m.] when Hansen's mother picked them up. The Omaha police found Cue at about 3:00 a.m. "sitting or half laying on the curb" in front of Hansen's house. The police took Cue into custody where they removed his blood-soaked clothing and did tests on the bloodstains. Blood containing DNA consistent with Deville's DNA was found on Cue's feet, socks, and jeans. Blood containing DNA consistent with Deville's DNA was also found in a trail of footprints that led from Deville's room to the front door of the Cue house, and on the floor mat and door sill of Florence Cue's car, which Cue used during the night of March 24.

Id. at *1-2 (ellipsis in original).

Cue filed an application for postconviction relief in July 2014, asserting ineffective assistance of counsel based on failure to preserve claims of sufficiency of the evidence and prosecutorial misconduct. Trial was continued multiple times at Cue's request for various reasons, including a change of counsel and for discovery purposes. The matter finally came to trial in June 2021.

One of the discovery continuances involved a request for DNA profiling under the then newly-amended Iowa Code section 81.10 (2020).[2] Cue identified four exhibits that were admitted at trial without DNA identification of whose blood was on them. In its October 2020 ruling, the trial court noted the motion should have been filed in the underlying case, not the postconviction case, and the motion's required statements were deficient. Nevertheless, the court considered the merits of Cue's section 81.10 motion and denied it, noting the "overwhelming

[2] The amendment allowed any defendant convicted of a felony to apply for a court order to profile DNA on a forensic sample. *See* 2019 Iowa Acts ch. 149, § 2 (effective July 1, 2019). The prior version of the statute was limited to defendants who had not been required to submit a sample for DNA profiling. *See* Iowa Code § 81.10(1) (2018).

evidence supporting Cue's conviction," that the unknown source of specific bloodstains "d[id] not make identity of the assailant a significant trial issue," and any "profiling results would not raise a 'reasonable probability' that Cue would not have been convicted." The supreme court denied Cue's interlocutory appeal on the DNA-profiling request.

At the PCR trial, the court considered Cue's assorted claims of ineffective assistance of counsel and prosecutorial misconduct. Cue submitted a deposition of his trial attorney, interrogatory answers, and transcripts as evidence but did not testify. The PCR court ruled Cue failed to prove his claims and denied the application. Cue appeals.

II. Standard of Review

"We review postconviction relief proceedings for errors at law." *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). "Applications for postconviction relief that allege ineffective assistance of counsel, however, raise a constitutional claim," and we review them de novo. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011).

We review the district court's ruling on an application for DNA testing for correction of errors at law. *See Tyson v. State*, No. 22-0104, 2023 WL 4759453, at *2 (Iowa Ct. App. July 26, 2023).

III. Analysis

On appeal, Cue asserts his felony trial counsel was ineffective in failing to object to alleged prosecutorial misconduct and raise the issues of self-defense and intoxication in a motion for judgment of acquittal. He further claims the trial court erred by denying his request for DNA testing on four items from the crime scene.

A. Ineffective assistance of counsel

In his direct appeal, Cue asserted that the State did not present sufficient evidence to overcome his defenses of intoxication and justification and that prosecutorial misconduct prejudiced his right to a fair trial. *See State v. Cue*, No. 10-1795, 2013 WL 5760572, at *3–4 (Iowa Ct. App. Oct. 23, 2013). The State countered that Cue had not preserved error on either claim, and we agreed. *Id.* He now urges that trial counsel provided ineffective assistance by failing to preserve error through appropriate motions relating to his defenses and objections for prosecutorial misconduct.

"To prove [an] ineffective assistance of counsel claim, [an applicant] ha[s] to show that . . . trial counsel (1) failed in an essential duty and (2) prejudice resulted from that failure." *DeVoss*, 648 N.W.2d at 64. The applicant must establish by a preponderance of evidence that "counsel's performance was outside the range of normal competency." *Id.* In this context, prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "Counsel . . . does not provide ineffective assistance if the underlying claim is meritless." *State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015).

1. Defenses. Cue argues that although trial counsel raised self-defense and intoxication to the jury, he failed an essential duty by not raising the issues in his motion for judgment of acquittal during trial.[3] A judgment of acquittal

[3] In the first motion for judgment of acquittal, the defense cited a lack of evidence as to premeditation and suggested that the knife used might be a smaller knife (to

is granted when "the evidence is insufficient to sustain a conviction." Iowa R. Crim. P. 2.19(8)(a).

Cue's only contention regarding his defenses is that he received ineffective assistance when counsel failed to mention them in his motions for judgment of acquittal. We therefore consider whether raising these issues in the motion would have been meritorious or would have affected our decision on appeal. *See Halverson*, 857 N.W.2d at 635. We begin by noting the defenses were mentioned in both the opening and closing arguments of both the State and defense, argued during trial to the jury, and the jury was instructed on both defenses—in other words, the defenses were timely and specifically asserted and considered by the jury. *See id.* at 639.

Intoxication. The jury was instructed, "Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent." For a finding of no specific intent, we require proof of a high level of intoxication. *State v. Guerrero Cordero*, 861 N.W.2d 253, 259 (Iowa 2015) (requiring more than evidence of mere intoxication to instruct the jury on the defense), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016).

In his opening statement to the jury, Cue's counsel stated what happened was unclear due to "intoxication, blackout." Green testified Cue was "buying

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raise doubt as to an element of the lesser-included offenses being met). The court ruled sufficient evidence generated fact questions about each element of first-degree murder and overruled the motion. At the close of the defense's evidence, counsel simply stated "We would renew the motion for judgment of acquittal as previously stated." The court again overruled the motion.

rounds" at two different bars early in the evening, until she "asked the bartender to cut him off" because "he was pretty intoxicated." On their way back to Cue's house, they stopped at a gas station, and the attendant described him as slurring his words and "a little intoxicated but not anything out of the ordinary." After they returned to his house, Deville retreated to his own bedroom while Cue, Green, and Florence spoke. Despite her descriptions of Cue grabbing her and grabbing Florence by the arm, Green described Cue as "mouthy" when he drank but not violent. Florence described him as acting drunk but otherwise normal.

After the altercation, Cue drove his mother's car from Council Bluffs and across Omaha to the bar to meet Hansen. He was able to navigate to his desired destination, though he lost a tire at some point in the drive and was driving on the rim of the wheel. The waitress, Davis, testified he was intoxicated or under the influence of something when he arrived and had another couple of drinks while there. Cue was able to repeatedly describe what happened while at the bar. Davis heard Hansen ask if anyone called an ambulance and Cue answered his mom did.

This evidence was sufficient to generate a jury question if Cue was so intoxicated he was unable to form specific intent. Even if raised in the motion for judgment of acquittal, it would not have affected the court's denial. Cue cannot show raising the defense in his motion would have made a difference in the result of the trial or on appeal, and thus he failed to demonstrate prejudice.

Self-defense. Counsel also asserted self-defense beginning in the opening statement to the jury. On his self-defense claim, Cue points to evidence presented "that Deville could be violent and aggressive." Cue presented several witnesses regarding Deville's reputation and incidents where he threatened to stab

individuals. Several instructions given to the jury explain justification, reasonable use of force, and provocation. The instructions are clear that Deville's character as "a dangerous and violent person" is not enough without evidence Cue "reasonably believe[d] the force [was] necessary to defend himself from any imminent use of unlawful force."

Responding law enforcement and an investigator testified no firearms, ammunition, or gun cases were found in the house. No knives were found near Deville, nor did he appear to have any weapon on him. It did not appear to officers that a struggle had occurred. The medical examiner described some minor bruising around scratches on Deville's arm and around his eye that could be defensive wounds, but no bruising to his knuckles as would indicate a fight.

On our review, we find no evidence was presented that Deville initiated the confrontation or posed actual danger to Cue justifying the use of lethal force. Even if the issue had been raised in his motion for judgment of acquittal, the State generated enough evidence to submit the issue for the jury to decide. The jury's finding Cue was not justified in stabbing Deville is supported by substantial evidence. Cue has not established he was prejudiced by counsel's failure to raise self-defense in his motion for judgment of acquittal.

2. Prosecutorial misconduct. Finally, Cue asserts his trial counsel provided ineffective assistance by failing to object to prosecutorial misconduct. To succeed on this claim, Cue "must demonstrate both that prosecutorial misconduct occurred and that the prosecutorial misconduct resulted in prejudice that denied [him] a fair trial." *See State v. Coleman*, 907 N.W.2d 124, 138 (Iowa 2018). To establish either prosecutorial error or misconduct, Cue "must show the prosecutor

acted with reckless disregard of [a duty to assure a fair trial] or intentionally made statements in violation of an obvious obligation, legal standard, or applicable rule that went beyond an exercise of poor judgment." *Id.* at 139. "[I]t is not prosecutorial misconduct for the prosecutor to make statements aimed at the theory of the defense." *Id.* at 140.

As in his direct appeal, Cue pinpoints statements by the county attorney he alleges constitute misconduct: one from opening statements and two from the State's rebuttal closing argument. Cue argues these statements, along with some others not previously identified or argued as misconduct, "were made to inflame the jury and direct their attention to irrelevancies like sex, lewd comments, etc." Cue urges the "comments represent severe and pervasive misconduct." We will only consider specific statements to the extent they were argued about and ruled on by the trial court. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citation omitted)).

First, Cue points to an incorrect comment during the State's opening statement that there was blood on the inside back of Cue's jeans where the bar manager saw the knife after the assault. This statement was not an accurate reflection of the evidence, which Cue's counsel effectively proved during cross-examination of the State's witnesses. The State admitted in an objection in front of the jury during cross-examination that the location statement in opening arguments was wrong, but that opening statements are not evidence, mitigating any prejudice. We do not find counsel's failure to object to a statement during

opening statements (which are not considered evidence) to be ineffective assistance when counsel instead actively proves the State's comment to be wrong.

The other two statements occurred during the State's rebuttal closing argument. The first was:

> Every murder scene has a mystery, some of those mysteries we will never solve. Part of the reason is because in every murder case, there is an empty chair, this is Rodney Deville, and he is not here to answer those questions. There is some of those questions we will never know and we are incapable of knowing because Rodney is not here to answer many of those questions.

But, as Cue's brief acknowledges, his own counsel had been using language about "unexplainable things" and "a lot of mystery to what happened." Cue's counsel did not breach an essential duty in failing to object to the prosecutor's response.

In the other contested statement, made at the end of the argument, the State said, "But as with every murder, we have an empty chair. Do the right thing." Cue claims this statement hurt his case, affected the jury's reasonable doubt as to his defenses of intoxication and self-defense, and was central to the prosecution as the last thing considered before the jury went to deliberate.

A prosecutor telling the jury to "do the right thing" has been found to divert the jury from deciding the case based on the evidence and constitutes prosecutorial misconduct. *See Coleman*, 907 N.W.2d at 142–43. But we consider these statements within the full context of the case. Considering the entire record, we do not think the prosecutor's statements, although improper, deprived Cue of a fair trial. *See State v. Musser*, 721 N.W.2d 734, 756 (Iowa 2006) (finding the prosecutor's improper "attempt[ ] to broaden the jury's duty to include a responsibility to do the right thing" was objectionable but not sufficient to deprive

the defendant of a fair trial). Rather, there was strong evidence against Cue, the comments did not reach a central issue, and—contrary to Cue's assertion—the statements were relatively isolated rather than severe and pervasive. Counsel's failure to object does not undermine our confidence in the outcome of the trial. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001); *see also State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (establishing factors to consider whether misconduct resulted in prejudice). Because Cue was not denied a fair trial, counsel did not provide ineffective assistance in failing to object to the statements.

B. DNA Testing

Cue asserts his counsel and the prosecutor erred by failing to DNA test all the evidence. Cue's application for DNA profiling identified four exhibits from his trial which either did not have Cue's DNA on them or had not been tested. He sought testing on exhibit 46/J–a rag/towel, exhibit 65/K–jean jacket, exhibit 67/M–jeans, and exhibit 27/12–piece of a hallway wall.[4] He claims this evidence means someone else must have been at the scene and his conviction must be set aside for a new trial with new witnesses and/or culprits identified by the DNA. We, like the district court, examine whether Cue's request meets the statutory requirements to be granted.

[4] The rag or towel taken from the home had a male's blood on it that did not match either Cue's or Deville's DNA. The jean jacket, which Cue had been wearing, had blood on it from an unknown female. The jeans, which Cue had been wearing, had two blood stains tested: one stain on the interior front hip/thigh area resulted in Cue and Deville as possible contributors and the second blood stain from the back calf area matched Deville. The wall exhibit looked like a knife with blood on it had pierced the sheetrock and the blood transferred; the blood belonged to a male.

The court must grant an application for DNA profiling it if finds of all the following:

> a. The forensic sample subject to DNA profiling is available and either DNA profiling has not been performed on the forensic sample or DNA profiling has been previously performed on the forensic sample and the defendant is requesting DNA profiling using a new method or technology that is substantially more probative than the DNA profiling previously performed.
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> b. A sufficient chain of custody has been established for the forensic sample.
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> c. The identity of the person who committed the crime for which the defendant was convicted was a significant issue in the crime for which the defendant was convicted.
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> d. The forensic sample subject to DNA profiling is material to, and not merely cumulative or impeaching of, evidence included in the trial record or admitted to at a guilty plea proceeding.
>
> e. The DNA profiling results would raise a reasonable probability that the defendant would not have been convicted if such results had been introduced at trial.

Iowa Code § 81.11(1).[5]

The district court found that the identity of Deville's assailant "was not a significant trial issue," noting Cue's defenses at trial were justification and intoxication, not alibi. *See id.* § 81.11(1)(c). The court further found the requested profiling was not material to the evidence presented to the jury and would not raise a reasonable probability Cue would not have been convicted if presented at trial. *See id.* § 81.11(1)(e). The court ruled Cue's application did not meet the statutory requirements and denied it.

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[5] Cue cites the earlier version of section 81.10 in effect from 2014 to June 30, 2019, when the granting of the motion only required the evidence be "available and in a condition that will permit analysis" instead of the more detailed paragraph (a) quoted above. *See* Iowa Code § 81.10(7) (2019). Again, he could not apply under the earlier form of the statute because it was limited to defendants "who ha[ve] not been required to submit a DNA sample for DNA profiling." *Id.* § 81.10(1). Because he applied under the 2020 version of section 81.10, we evaluate it under the requirements as listed in section 81.11.

The PCR court considered at trial whether the failure to test constituted prosecutorial misconduct and ineffectiveness by Cue's counsel, and it determined (1) the State did not suppress the evidence and it was available for testing, and (2) it was "likely that the unknown DNA was better for the defense than if . . . the identity of all DNA was determined" because it allowed for a strategy of using the unknown to claim reasonable doubt. The PCR court further found the overwhelming evidence of Cue's guilt—particularly Deville's identified DNA "found on Cue's feet, socks, and jeans" and Cue's bragging at the bar about stabbing a guy while in possession of a visible knife—to demonstrate no prejudice from the lack of DNA identification from the items.

Of the four pieces of evidence Cue sought testing on, only one had no testing previously performed (the wall piece); Cue does not identify a new method or technology substantively more probative than the previous profiling for the jeans, washrag, or jacket. *See id.* § 81.11(1)(a). Rather, he sought "complete DNA profiles" from the evidence without offering any comparison. Without any claimed new method, Cue's application fails on the first element for all but the wall section.

Considering the remaining requirements to order the test, we find Cue has not shown identity was a significant issue at trial or why the evidence would not be "merely cumulative or impeaching," and the results would not raise a reasonable probability he would not have been convicted if introduced at trial. Cue argues the identity of the killer was an issue at trial. Cue introduced angry voicemail messages from Green's jealous boyfriend that she received after the homicide and inferred in closing argument that the boyfriend killed Rodney. But this argument

was so speculative as to be insignificant. *See Godfrey v. State*, 962 N.W.2d 84, 102 (Iowa 2021) ("An inference is not legitimate if it is based upon suspicion, speculation, conjecture, surmise, or fallacious reasoning.").

As the district court explained, overwhelming evidence supports Cue's conviction, including that testimony from Green and Florence indicated only they, Cue, and Deville were in the house. Cue was with Deville when the stabbing occurred, and he walked through Deville's blood, leaving bloody footprints across the floor and staining his socks, jeans, and skin. The employee at the bar Cue went to after the assault testified she heard Cue say several times to his friends that he had stabbed someone, and he told her she should be scared of him because "I just stabbed someone." We conclude DNA profiling results of the blood on the wall would not raise a reasonable probability that Cue would not have been convicted if such results had been introduced at trial.

The district court correctly denied Cue's application for DNA profiling.

AFFIRMED.