ELECTRONICALLY FILED JAN 13, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 15-0772

ROBERT KROGMANN,
Petitioner-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
THE HONORABLE THOMAS A. BITTER, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Robert Krogmann appeals the denial of his application for postconviction relief entered in Delaware County, Iowa. The Honorable Thomas A. Bitter presided. The issues in this appeal are whether the asset freeze violated Krogmann's constitutional rights, whether counsel was ineffective, whether the prosecutor committed misconduct, and whether his consecutive sentences violate double jeopardy.

Course of Proceedings

On March 13, 2009, Krogmann went to the home of his former girlfriend, Jean Smith, and shot her in the stomach, arm, and through her spine with a .44 caliber Ruger because she refused to reconcile with him. Trial Information (3/23/09); App. 191-92. Three days after the shooting, the Delaware County Sheriff filed a preliminary complaint against Krogmann accusing him of attempted murder. Complaint (3/16/09); App. 188. Krogmann entered an initial

appearance on March 16, 2009, and informed the district court he retained David Nadler of Cedar Rapids, Iowa, to represent him. Initial Appearance (3/16/09); App. 189. On March 23, 2009, the Delaware County Attorney charged Krogmann with one count of attempted murder, a violation of Iowa Code section 707.11 (2009) punishable as a class "B" felony, and one count of willful injury causing serious injury, a violation of Iowa Code section 708.4 (2009), punishable as a class "C" felony. Trial Information (3/23/09); App. 191-92.

On March 24, 2009, the Delaware County Attorney applied for an order freezing Krogmann's assets. Application for Order (3/24/09); App. 193-94.[1] On March 30, 2009, the district court entered an order freezing all of Krogmann's assets and requiring him to "make application to the Court for the sale or transfer of an asset at which time the Court will determine whether good cause has been shown to grant the application." Order (3/30/09); App. 195. Krogmann resisted the State's application for the order freezing the assets on April 2, 2009. Resistance (4/2/09); App. 196.

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[1]It is unclear from the record why the application was not mailed to defense counsel at his proper address.

The record does not contain any disposition related to Krogmann's resistance. *See* Trial Court Papers. Krogmann, however, sought interlocutory relief in the Iowa Supreme Court. Applic. for Interlocutory Appeal (4/28/09); App. 197-99. The State resisted the application and this Court denied Krogmann's application on May 26, 2009. State's Resist. (5/12/09), Sup. Ct. Order (5/26/09); App. 203-07, 212.

While the criminal case was pending, there was also a probate matter initiated. After the district court froze Krogmann's assets, Krogmann voluntarily petitioned for the appointment of a conservator. Pet. for Conservator (4/13/09); App. 452-53. The probate court granted Krogmann's request for a conservator after finding Krogmann to be "incapacitated and [] unable to carry on business and make decisions and transactions for the foreseeable future." Order Appointing Conservator (4/13/09); App. 454-55. The probate court appointed attorney Gary McClintock conservator and directed him to "adhere to the Order of the District Court in the criminal case and make application to the Court for authority to sell or transfer any assets other than in the normal course of the farming operation whether the transfer is made for good and valuable

consideration." Order Appointing Conservator (4/13/09); App. 454-55.

In May of 2009, Krogmann moved to have his $750,000 cash-only bond reduced alleging that a lower amount would assure his appearance. Mot. For Bond Reduction (5/12/09); App. 208-09. The State resisted and asserted Krogmann would be a flight risk and alleged that he presented a danger to himself and others. Resistance (5/13/09); App. 210. The district court denied Krogmann's request. Order (6/1/09); App. 213. In addition, the court found that:

> based upon the information provided to the Court, the nature of the offense, the seriousness of the injuries suffered by the alleged victim, the Court hereby determines that the bond should be elevated.

Order (6/1/09); App. 213. The district court increased Krogmann's bond to $1,000,000 cash-only and directed that he "continue to comply with any mental health counseling recommendations." Order (6/1/09); App. 213.[2]

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[2] Krogmann sought habeas corpus relief in the Iowa Supreme Court after the district court increased his bond. Resist. To Pet. for Writ Habeas Corpus (10/21/09); App. 316-20. The State resisted Krogmann's petition. Resist. To Pet. for Writ Habeas Corpus (10/23/09); App. 316-20. The Iowa Supreme Court denied Krogmann's petition finding it was "another attempt at modifying the bond imposed by the district court or modifying the order regarding the freezing of defendant's assets. . . " Sup. Ct. Order (10/21/09); App.

On June 18, 2009, the State filed a restitution lien pursuant to Iowa Code section 910.10 on Krogmann's property including all inventory, equipment, vehicles, real estate, crops/grain and miscellaneous property. Rest. Lien (6/18/09); App. 214-18.

In June of 2009, defense counsel Nadler withdrew from representing Krogmann because Krogmann retained Mark Brown to represent him in the criminal action. Mot. For Leave to Withdraw (6/22/09); App. 219. The district court granted attorney Nadler's request to withdraw and ordered he provide new counsel with the discovery material provided by the State. Order (6/22/09); App. 220.

After a change of venue was granted from Delaware County to Dubuque County at Krogmann's request, trial on the charges began on November 2, 2009, and ended with guilty verdicts on both counts on November 6, 2009. Mot. Change of Venue (7/30/09), Order (9/2/09), Order Re: Jury Verdicts (11/9/09); App. 241-304, 324.

On December 21, 2009, the district court sentenced Krogmann to an indeterminate term of incarceration not to exceed 25 years for his attempted murder conviction and an indeterminate term of

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321-23. This Court also noted that while the asset freeze made it more difficult for him to post bond, he was "not precluded from posting bond." Sup. Ct. Order (10/21/09); App. 321-23.

incarceration not to exceed 15 years for his willful injury conviction. Judg. and Sent. (12/21/09); App. 325-27. Both sentences were subject to a mandatory minimum sentence. Judg. and Sent. (12/21/09); App. 327-29. The court further ordered that the sentences be imposed consecutive to one another. Judg. and Sent. (12/21/09); App. 325-27.

Krogmann appealed his convictions. *State v. Krogmann*, 804 N.W.2d 518, 520 (Iowa 2011). On appeal, he alleged the district court erred in granting the State's pretrial request to seize his assets and the prosecutor committed misconduct in asking him an inflammatory question during cross-examination. *Id.* The Iowa Supreme Court rejected both of the claims and found that the challenge to the asset freeze was not preserved and that the prosecutor's question, "though inflammatory and improper" was not misconduct. *Id.* at 525, 526.

Krogmann filed an application for postconviction relief on October 5, 2012. PCR Applic. (10/5/12); App. 1-12. The State filed an answer on October 29, 2012. Answer (10/29/12); App. 13-14. The district court held a hearing on the application on January 22, 2015. PCR Tr. p. 1, lines 1-25, Order (4/14/15); App. 47-57, 61. Following the hearing, the district court denied Krogmann relief. Order

(4/14/15); App. 47-57. Krogmann filed a motion to enlarge the court's findings, however, the record does not contain any ruling on the motion to enlarge. Mot. to Enlarge (4/27/15); App. 58-59. This appeal follows. Not. of Appeal (5/8/15); App. 60.

Facts

Forty-nine year old Jean Smith was at her Dundee, Iowa, home alone around 8:30 in the morning of March 13, 2009, when Robert Krogmann arrived at her home unexpectedly. Trial Tr. p. 202, line 7 through p. 203, line 13; App. 331-32. The two dated for two years but Smith broke off the relationship the month before. Trial Tr. p. 203, line 22 through p. 204, line 7; App. 332-33. Krogmann was desperate to rekindle the relationship; he called and sent text messages to Smith and even brought flowers to her at work. Trial Tr. p. 204, line 8 through p. 205, line 14; App. 333-34. Smith had no intention of getting back together with Krogmann and told him to "move on with his life." Trial Tr. p. 204, line 8 through p. 205, line 14; App. 333-34.

Krogmann, however, tried one last attempt to change Smith's mind about the relationship. With a .44 Ruger in his pocket, he drove to her home that morning, and knocked on Smith's door. Trial Tr. p.

205, line 20 through p. 206, line 5, p. 457, line 23 through p. 458, line 23, p. 458, line 21 through p. 459, line 10; App. 334-35, 390-92. Unaware that he had a gun, Smith let Krogmann in. Trial Tr. p. 206, lines 1-20; App. 335. Krogmann grilled Smith about why she would not reconcile with him and promised to "change." Trial Tr. p. 206, lines 6-11; App. 335. After she told him she could no longer continue to be in a relationship with him, she turned and went to get a cup of coffee. Trial Tr. p. 206, lines 11-19; App. 335. When she turned back around to look at Krogmann, he had the gun pointed at her. Trial Tr. p. 206, lines 11-20; App. 335.

Smith asked Krogmann if he was going to shoot her. Trial Tr. p. 206, lines 22-25; App. 335. He told her if he could not have her, "no one was going to have" her. Trial Tr. p. 206, lines 22-25; App. 335. He also told her that they would both die that day. Trial Tr. p. 206, lines 22-25; App. 335. Krogmann raised the .44 revolver and shot Smith in the stomach. Trial Tr. p. 207, lines 1-24, p. 379, line 12 through p. 380, line 16; App. 336, 382-83. Smith asked Krogmann to call 911 but he refused. Trial Tr. p. 207, lines 1-18; App. 336. Krogmann told Smith he left his phone in his car so he would not have to call for help. Trial Tr. p. 207, lines 1-18; App. 336.

Krogmann then shot Smith again, this time in the right arm. Trial Tr. p. 207, lines 19-25; App. 336. Smith again pleaded with Krogmann to call for help but he refused. Trial Tr. p. 208, lines 1-7; App. 337. Krogmann told Smith he was not going to go to jail for attempted murder. Trial Tr. p. 208, lines 1-7; App. 337.

Rather than call or render aid for the now twice-shot woman, Krogmann shot her again through the spine. Trial Tr. p. 208, lines 8-22; App. 337. The third shot caused Smith to fall to the floor. Trial Tr. p. 208, lines 8-22; App. 337. Krogmann again told her he would not call anyone. Trial Tr. p. 208, lines 8-22; App. 337. He did tell Smith, however, it was taking her a long time to die. Trial Tr. p. 211, lines 6-16; App. 340. Krogmann did agree to get her a pillow so Smith could rest her head on it. Trial Tr. p. 208, line 23 through p. 209, line 10; App. 337-38. Krogmann also agreed to get her rosary from the cupboard and said a prayer with her. Trial Tr. p. 209, lines 2-10; App. 338.

Smith remembered there was a phone in her living room and thought she could slide over to it to call for help. Trial Tr. p. 209, lines 11-21; App. 338. Krogmann, however, told her not to move or he would shoot her again. Trial Tr. p. 209, lines 11-21; App. 338. Smith

begged Krogmann to call 911 and he refused. Trial Tr. p. 209, lines 11-21; App. 338.

Lying helpless on the floor, Smith asked Krogmann to call her mother; she did not want Krogmann's voice to be the last voice she would ever hear. Trial Tr. p. 209, line 22 through p. 210, line 4; App. 338-39. Krogmann got her cell phone but did not call Smith's mother. Trial Tr. p. 210, lines 2-23; App. 339. Smith overheard Krogmann tell someone he "did a bad thing." Trial Tr. p. 210, lines 2-23; App. 339. Krogmann actually called his son Jeff and admitted he "shot Jean" and that he did not "want to live." Trial Tr. p. 210, lines 2-23, p. 233, line 6 through p. 234, line 20; App. 339, 343-44. Jeff Krogmann told his father he would get to the house as soon as possible. Trial Tr. p. 234, line 21 through p. 235, line 5; App. 344-45. The younger Krogmann drove to Jean Smith's residence and while en route, called 911 to report the shooting. Trial Tr. p. 234, line 21 through p. 235, line 5; App. 344-45.

After this conversation ended, Krogmann called Smith's mother in Texas. Trial Tr. p. 210, line 24 through p. 211, line 5, 354, lines 2-4; App. 339-40, 375. The call lasted for about 15 seconds but Smith's mother, Mary Schneiders, knew something was wrong. Trial Tr. p.

210, line 24 through p. 211, line 5, p. 353, lines 13-16, p. 355, line 22 through p. 356, line 4, p. 356, lines 15-25; App. 339-40, 374, 376-77. Schneiders was so concerned about her daughter that she immediately called her son, who lived near Smith, to have him check on her (Smith). Trial Tr. 356, line 23 through p. 357, line 20; App. 377-78. Schneiders told her son to "get over to Jean's house as fast as you can, something's going on." Trial Tr. p. 357, lines 11-20; App. 378.

Before Michael Schneiders arrived at Jean Smith's home, Krogmann's son, Jeff, walked in. Trial Tr. p. 211, lines 17 through p. 212, line 23; App. 340-41. Jeff Krogmann arrived at the house to see Smith lying on the floor in her robe that was soaked with blood. Trial Tr. p. 236, line 21 through p. 238, line 9; App. 346-48. Jeff Krogmann was still on the phone with the 911 operator when he arrived at the house. Trial Tr. p. 236, line 21 through p. 238, line 9; App. 346-48. Jeff Krogmann described the scene and told the operator Jean Smith had been shot. Trial Tr. p. 236, line 21 through p. 238, line 9; App. 346-48.

Jeff Krogmann thought his father was distraught and suicidal. Trial Tr. p. 239, lines 1-23; App. 349. Jeff Krogmann tried to calm

down his father and managed to get the .44 caliber gun out of his father's hand. Trial Tr. p. 239, lines 1-23; App. 349.

By this time, Michael Schneiders, Jean Smith's brother, arrived at the house. Trial Tr. p. 241, line 6 through p. 242, line 9; App. 351-52. Once Michael Schneiders saw his sister on the floor covered in blood, he began yelling at Robert Krogmann. Trial Tr. p. 241, line 6 through p. 242, line 9; App. 351-52. Schneiders grabbed a broom from the kitchen and began hitting Krogmann with it to get him out of Smith's house. Trial Tr. p. 242, lines 1-8; App. 352. After Robert Krogmann left the house, Schneiders turned his attention to his severely injured sister. Trial Tr. p. 257, line 18 through p. 259, line 4; App. 357-59. Schneiders tried to stop his sister's bleeding but it was difficult because she had three wounds. Trial Tr. p. 258, line 7 through p. 259, line 9; App. 358-59.

The Delaware County Sheriff, John LeClere, arrived at the house minutes later. Trial Tr. p. 259, line 5 through p. 260, line 22; App. 359-60. LeClere got his first aid kit and tried help the injured Smith. Trial Tr. p. 259, line 9 through p. 260, line 22, p. 267, lines 3-20; App. 359-60, 363.

Emergency medical personnel arrived to render assistance to Smith. Trial Tr. p. 266, line 9 through p. 268, line 24, p. 320, line 18 through p. 321, line 9; App. 362-64, 366-67. David Saner, an emergency medical technician, determined Smith had a weak pulse and was in "profound shock" due to the extreme loss of blood. Trial Tr. p. 321, line 22 through p. 323, line 13; App. 367-69. Saner also discovered a "gross injury" to her right upper arm. Trial Tr. p. 323, lines 14-25; App. 369. Smith's right arm was "barely hanging" on. Trial Tr. p. 323, lines 14-25; App. 369. Saner also stabilized Smith's neck so she could be transported to the hospital. Trial Tr. p. 324, line 1 through p. 326, line 23; App. 370-72. He also requested a helicopter to meet them at the hospital because the closest hospital did not have a neurosurgeon to tend to Smith's spinal injuries. Trial Tr. p. 324, line 1 through p. 326, line 23; App. 370-72.

Officers located Robert Krogmann at his home where he was arrested and taken into custody. Trial Tr. p. 244, line 8 through p. 245, line 25; App. 354-55. Additional facts will be discussed below as relevant to the State's case.

ARGUMENT

I. The Defendant Cannot Demonstrate A Violation Of His Constitutional Rights.

Standard of Review

Appellate review of postconviction proceedings is reviewed for correction of errors at law. Iowa R. App. P. 6.907; *Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998). To the extent that Krogmann has alleged a violation of his constitutional rights, review is de novo. *State v. Hoskins*, 711 N.W.2d 720, 725 (Iowa 2006).

Preservation of Error

Krogmann asserts that the pretrial asset freeze violated his constitutional rights because (a) the asset freeze was illegal; (b) counsel was ineffective in dealing with the asset freeze; (c) the prosecutor committed misconduct in obtaining and maintaining the asset freeze; and (d) prejudice should be presumed or the court should find Krogmann established prejudice as a result of the asset freeze. Def. Brief at 16-38. The State does not agree that all of these claims may be raised on appeal.

Krogmann's outright challenges to the legality of the asset freeze and the claim of prosecutorial misconduct cannot be properly brought in this appeal because they were not properly raised either on

direct appeal or as a claim of ineffective assistance of counsel. Iowa Code § 822.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. *Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.*

Iowa Code § 822.8 (emphasis added). Generally, a claim not raised on direct appeal cannot be raised in a postconviction relief proceeding unless the applicant can demonstrate a sufficient cause or reason for not properly raising the issue previously. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Ineffective assistance of counsel may be sufficient reason for the failure to raise the claims below. *Id.* Notably, Krogmann, has neither argued nor demonstrated sufficient reason for the failure to properly raise the claims.

Likewise, Krogmann's claim of prosecutorial misconduct was raised on direct appeal and addressed by the Iowa Supreme Court. *Id.* at 526. Though Krogmann attempts to recast the issue as prosecutorial misconduct for failing to challenge the asset freeze, that

also cannot be raised for the first time in a postconviction action absent sufficient reason or cause for not having raised the issue before. It is unclear from Krogmann's brief whether he is alleging ineffective assistance of counsel for failing to allege prosecutorial misconduct because there is no analysis of the breach of duty or prejudice with regard to the claim of prosecutorial misconduct. The postconviction court considered both of these claims within the context of ineffective assistance of counsel and properly determined that counsel effectively represented Krogmann. The postconviction court's findings must stand.

Ineffective assistance

Krogmann asserts that under both the federal and Iowa constitutions, he was denied the effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). A defendant claiming ineffective assistance must prove both that

counsel's performance was deficient and that prejudice resulted. *Strickland*, 466 U.S. at 687.

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam v. State,* 745 N.W.2d 719, 721 (Iowa 2008). Counsel is presumed to have acted competently and within the wide range of reasonable professional assistance. *DeVoss v. State,* 648 N.W.2d 56, 64 (Iowa 2002). To overcome this presumption, the defendant must present an affirmative factual basis establishing inadequate representation. *Millam,* 745 N.W.2d at 721. The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Id.* at 722; *Ledezma,* 626 N.W.2d at 143.

A. Asset freeze

1. Breach of duty

Krogmann raises a laundry list of ineffective assistance claims as it pertains to the asset freeze. He alleges counsel was ineffective in failing to properly object to the asset freeze; in failing to sufficiently preserve the issue for interlocutory or direct appeal; in failing to file a motion to reconsider the asset freeze; in failing to object to the

prosecutor's and victim's participation in the asset freeze and applications for funds; in failing to seek to terminate the freeze order, in failing to cite controlling authority; and in failing to allege he was prejudiced by the asset freeze. These claims must be addressed in the context and continuum of the attorneys who represented him. In other words, all of the claims do not apply to both counsel. Rather, some of the claims pertain to attorney Nadler and others pertain to attorney Brown.

Attorney Nadler

Attorney David Nadler represented Krogmann from March 23 to June 22, 2009. Appearance (3/23/09), Withdrawal (6/24/09); App. 190, 221. The State applied for an order freezing Krogmann's assets on March 24, 2009. Applic. For Order (3/24/09); App. 193-94. The district court granted the motion on March 30, 3009. Order (3/30/09); App. 195.

The State served attorney Nadler with a copy of the application however, it was mailed to the wrong address. Applic. For Order (3/24/09); App. 193-94. The district court granted the State's application before Nadler had a chance to object. Order (3/30/09);

App. 195. Nadler, however, filed a resistance on April 2, 2009, and alleged:

> COMES NOW the Defendant, by counsel, and hereby resists the State's application for order, and in support thereof states:
>
> 1. The State asks the Court to freeze Defendant's assets.
>
> 2. The State has cited no authority for such nor does any exist.
>
> 3. Should the Court deem a hearing necessary on the State's application, the undersigned will not be available for hearing for one and one half weeks starting 4/6/09 due to being in trial in federal court.
>
> WHEREFORE, Defendant prays the Court deny the State's application for order, and prays for such further and other relief as may be fair and just.

Resistance to Application (4/2/09); App. 196. The record does not contain any disposition related to the resistance. *See* Trial Court Papers. Instead, Nadler sought interlocutory relief in the Iowa Supreme Court. Applic. for Interlocutory appeal (4/28/09); App. 197-99. The State resisted the application and this court denied the application on May 26, 2009. State's Resist. (5/12/09), Sup. Ct. Order (5/26/09); App. 203-07, 212.

Attorney Nadler testified that he thought that the asset freeze was "outrageous." PCR Exh. 3, p. 8, lines 1-6; App. 152. He

immediately resisted the asset freeze but did not think that "a judge that would enter an order like that was going to give my resistance much time." PCR Exh. 3, p. 8, lines 11-15; App. 152. He also thought he was "dealing with a cowboy judge who was going to order whatever he wanted." PCR Exh. 3, p. 11, lines 19-25; App. 155. Nadler did not even think about filing a motion to reconsider. PCR Exh. 3, p. 12, lines 1-14; App. 156. He thought it would be "pointless" to file anything else with the same judge who had not ruled on his resistance. PCR Exh. 3, p. 13, lines 20-24; App. 157. Nadler felt the only way he could "rein in" the district court was by seeking an appeal. PCR Exh. 3, p. 12, lines 1-14; App. 156. Such was his strategy with regard to the asset freeze. PCR Exh. 3, p. 13, lines 1-12; App. 157. He thought that his only viable option was to seek redress in the appellate court and assert there was no authority for the asset freeze and allege a due process violation. PCR Exh. 3, p. 13, lines 1-12, Applic. Interlocutory Appeal (4/28/09); App. 157, 197-99. He also thought that by seeking an interlocutory appeal he preserved the record sufficiently. PCR Exh. 3, p. 12, lines 15-22; App. 157. Ultimately, that strategy failed when the supreme court denied the application. Sup. Ct. Order (5/26/09); App. 212. Nadler also

testified that the asset freeze had no bearing on his representation of Krogmann during the limited time he represented him. PCR Exh. 3, p. 21, lines 2-5, p. 35, lines 3-23; App. 159, 165.

Nadler's strategy, albeit unsuccessful, was a reasonable one. *Ledezma*, 626 N.W.2d at 143 (improvident trial strategy, miscalculated tactics, and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel); *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). Nadler resisted the State's application for an asset freeze but the district court took no action on it. Resistance to Application (4/2/09); App. 196. He thought the only means to challenge the district court was to have an appellate court look at the case, however, the court denied his interlocutory appeal. Sup. Ct. Order (5/26/09); App. 212. He believed he preserved the claim well enough for appellate review, however, this court later determined that not to be the case. *Krogmann*, 804 N.W.2d at 525. This is an instance in which counsel took steps to challenge the asset freeze but his actions were frustrated by the district court's failure to rule on the resistance and this court's decision not to grant interlocutory relief.

Moreover, during the three-month period Nadler represented Krogmann, Nadler testified the asset freeze had no impact on his representation. PCR Exh. 3, p. 21, lines 2-5, p. 35, lines 3-23; App. 159, 165. Attorney Nadler cannot be faulted for not taking a different course of action on the asset freeze when it did not adversely impact the representation he provided to Krogmann. He had no basis to dissolve the asset freeze and no basis to allege prejudice especially after he tried twice unsuccessfully to do so. Additionally, Krogmann retained new counsel, Mark Brown, and Nadler had no occasion to deal with the conservatorship. No breach of duty occurred.

Attorney Brown

Krogmann retained the services of Mark Brown on June 22, 2009. Mot. for Leave to Withdraw (6/22/09); App. 219. Because Brown was not involved in the asset freeze, he testified he did not take any action to challenge it. He noted that by the time he became involved in the case, the asset freeze was complete, the conservatorship was set up, and he was aware of the steps he needed to take to obtain payment for his services. PCR Exh. 2-1, p. 19, line 11 through p. 20, line 7; App. 120. Brown testified that he did not challenge the asset freeze for two reasons. First, he knew Nadler

tried, unsuccessfully, to challenge the asset freeze both at the district court level and through an interlocutory appeal. PCR Exh. 2-1, p. 20, line 8 through p. 22, line 7; App. 120-21. He thought it would have been fruitless to challenge the asset freeze again given that it had been tried twice before and was rejected both times. PCR Exh. 2-1, p. 57, line 19 through p. 59, line 24; App. 127.

Brown also testified that he understood that Krogmann had also retained the services of attorney David Dutton to challenge the asset freeze within the context of the conservatorship. PCR Exh. 2-1, p. 21, line 7 through p. 22, line 3, p. 56, lines 13-25; App. 121, 126. Brown felt that he had been hired to defend Krogmann in the criminal case and that was what he was focusing on; presenting the best defense for Krogmann. PCR Exh. 2-1, p. 21, line 7 through p. 22, line 3; App. 121.

Moreover, the asset freeze had little effect on the defense. Although Brown thought that the process he had to go through to get paid through the conservatorship was a bit cumbersome, he accepted that and focused his attention on the defense. PCR Exh. 2-1, p. 56, line 3 through p. 58, line 19, p. 61, lines 3-6; App. 126-28. The money was available for Krogmann's defense and he knew he would get paid.

PCR Exh. 2-1, p. 56, line 3 through p. 58, line 19, p. 61, lines 3-6; App. 126-28.

Given this testimony, Krogmann cannot demonstrate counsel breached a duty in failing to challenge the conservatorship. Brown reasonably determined that challenging the asset freeze would have been fruitless because prior counsel Nadler had twice done so without success. Brown also spent his time focusing on the defense and left the matter of the asset freeze to David Dutton who Krogmann hired to challenge the matter. Brown testified that the asset freeze had little, if any effect, on his representation of Krogmann. Thus, no breach of duty occurred.

2. Prejudice

Krogmann must also demonstrate prejudice. To do so, he must establish that had either attorney challenged the asset freeze, the asset freeze would have been dissolved and he would not have been convicted of attempted murder and willful injury. On the strength of the evidentiary record, Krogmann cannot demonstrate a reasonable probability of a different outcome even if the asset freeze had been successfully challenged.

The evidence established that on the morning of March 13, 2009, Krogmann went to the home of his former girlfriend, Jean Smith, to convince her to get back together. *Krogmann*, 804 N.W.2d at 520. While there, Krogmann shot Smith three times with a .44 revolver. *Id.* The first bullet entered Smith's stomach, the second her arm, and the third her spine. *Id.*

Krogmann called his son, Jeff, and told him what he had done. *Id.* Jeff Krogmann rushed to Smith's house and called 911 while en route. *Id.* When he arrived at Smith's house, she was one the floor with her robe soaked in blood. *Id.* Robert Krogmann was still holding the gun and turned it over to his son. *Id.* Given these facts, even if either attorney had done something different to challenge or dissolve the asset freeze, there is no reasonable likelihood of a different outcome. The evidence against him is compelling. Thus, Krogmann cannot demonstrate prejudice.

3. Structural error

Krogmann argues, however, that this is a case of structural error. "Structural errors are not merely errors in a legal proceeding, but errors affecting the framework within which the trial proceeds." *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991). In Iowa, this court

has recognized that structural error occurs when (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants. *State v. Feregrino*, 756 N.W.2d 700, 707 (Iowa 2008) (citing *United States v. Cronic*, 466 U.S. 648, 659). Under these circumstances, no specific showing of prejudice is required as the criminal adversary process itself is "presumptively unreliable." *Lado*, 804 N.W. 2d at 252. Krogmann is incorrect in his belief that structural error occurred.

At no point in this case was Krogmann either actually or constructively denied counsel as a result of the asset freeze. His first attorney, Nadler, testified there was no negative impact from the freeze order or that the freeze order impaired his ability to represent Krogmann. PCR Exh. 3, p. 33, line 21 through p. 34, line 1; App. 163-64. Likewise, when Brown began representing Krogmann, the asset freeze was not a concern to him. Exh. 2-1, p. 22, line 19 through p. 23, line 6; App. 121. Even as Brown continued to represent Krogmann,

the asset freeze was not a problem, just a slight inconvenience. Exh. 2-1, p. 56, line 15 through p. 61, line 6; App. 126-28.

Moreover, the asset freeze did not stop either attorney from actively working on the case. At Krogmann's request, Nadler filed a motion for bond reduction and a motion to suppress. Mot. Bond Reduction (5/12/09), Mot. to Supp. (5/26/09); App. 208-09, 211. Nadler also attempted to challenge the asset freeze both in the district court and at the appellate level. Resistance (4/2/09), Applic. Interlocutory Appeal (4/28/04); App. 196-99. Brown filed additional authorities in support of the motion to suppress, retained a private investigator, filed a successful motion for change of venue, a jury questionnaire, and retained a mental health expert. Authorities Mot. to Supp. (7/13/09), Marlin Letter (7/22/09), Mot. Change of Venue (7/30/09), Jury Question. (10/20/09), Trial Tr. p. 524, line 10 through p. 560, line 11; App. 222-303, 404-40. The representation Krogmann received from both his attorneys does not support a claim of structural error. The attorneys were actively engaged in his defense, they challenged the State's evidence, and prepared a defense that was reasonable albeit unsuccessful. At no point in the

prosecution of this case was Krogmann bereft of counsel nor did they fail to test the prosecution's case.

The only time that Brown made a request for funds from the conservatorship and that request was denied was for a jury consultant or a psychologist to assist Brown with jury selection. PCR Exh. 2-1, p. 22, lines 8-17, p. 61, lines 13-25, p. 79, line 20 through p. 80, line 16, p. 91, line 23 through p. 95, line 15, PCR Exh. 2-2, p. 99, line 19 through p. 100, line 1; App. 121, 128, 131, 134-35, 137. That denial, in and of itself, does not amount to structural error. A jury consultant is not a "basic" tool of the defense. *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999); *MacEwan v. State*, 701 So.2d 66, 70 (Ala. Crim. App. 1997). Selecting a jury is "part of an attorney's stock-in-trade." *Busby*, 990 S.W.2d at 271. The jury consultant Brown sought to hire was not an attorney but a psychologist. Exh. 2-2, p. 100, line 18 through p. 101, line 11; App. 137. Brown, however, had extensive experience in picking juries given his career handling all levels of criminal defense work at both the state and federal levels since he began practicing in 1992. PCR Exh. 2-1, p. 5, line 12 through p. 7, line 22; App. 118. There was no structural error and prejudice should not be presumed. The postconviction court must be affirmed.

B. Prosecutorial Misconduct

1. Breach of duty

Krogmann also contends counsel was ineffective in failing to allege that the prosecutor committed misconduct in seeking the asset freeze. Although either attorney could have challenged the asset freeze on the grounds of prosecutorial misconduct, neither elected to do so and with good reason.

As set forth above, Nadler sought to challenge the asset freeze at the district court level and through an interlocutory appeal. Resistance to Application (4/2/09), Applic. Interlocutory Appeal (4/28/09); App. 196-99. He testified that he did not think he would get any relief in the district court and thought his only available alternative would be through the appellate court. PCR Exh. 3, p. 13, lines 1-12; App. 157. It stands to reason that if he was unsuccessful challenging the asset freeze at the district court level, he would also be unsuccessful alleging prosecutorial misconduct at the district court level. Because Nadler represented Krogmann for such a short time—between March and late June—the prosecutor's actions in seeking the asset freeze did not impact his representation. As such, there was no need for Nadler to allege prosecutorial misconduct. *State v. Dudley*,

766 N.W.2d 606, 620 (Iowa 2009) (counsel has no duty to raise a meritless challenge).

Brown also testified that he did not consider a challenge to the asset freeze as prosecutorial misconduct. PCR Exh. 2-1, p. 63, line 11 through p. 64, line 25; App. 128. He believed David Dutton was working within the conservatorship to end the asset freeze and that the issue would be handled in probate court. PCR Exh. 2-1, p. 58, line 20 through p. 62, line 14, p. 65, lines 12-24; App. 127-29.

Although counsel could have raised a claim of prosecutorial misconduct and challenged the asset freeze, the failure to do so does not amount to a breach of duty. That is because Krogmann cannot establish that misconduct existed. A party claiming prosecutorial misconduct must show misconduct, and that the misconduct resulted in prejudice to such an extent the defendant was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). A party is entitled to a new trial based on prosecutorial misconduct only if the party has shown prejudice. *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002). Prejudice in this context requires the court to consider:

> (1)the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary

> instructions or other curative measures and; (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 869. The prosecutor's actions do not rise to the level of misconduct.

Krogmann alleges that the prosecutor acted improperly in seeking to freeze his assets because the reasons given in the initial motion were not borne out in the record. What the court must focus on, however, is the correct analysis of the issue. That is, did the prosecutor commit misconduct in seeking the asset freeze and was Krogmann prejudiced by it? At the time the prosecutor sought to freeze Krogmann's assets, the prosecutor believed:

> . . . we had a victim who had substantial injuries resulting in substantial bills from various hospitals. Prior to the asset freeze, we were provided with some figures in excess of one million dollars for medical expenses with essentially no cap in sight. There obviously would be a cap somewhere down the road but already in excess of a million dollars.

PCR Exh. 1, p. 7, lines 1-25; App. - -. Even though the victim had insurance, there was no way of knowing what would or would not be covered by insurance. PCR Exh. 1, p. 18, lines 1-10; App. 107. Moreover, once the asset freeze was in place, Krogmann set up the voluntary conservatorship to conduct his affairs from jail. PCR Exh. 1, p. 20, line 12 through p. 21, line 10; App. 109-10. The prosecutor

committed no misconduct in seeking the asset freeze as he was trying to preserve assets for victim restitution. The asset freeze resulted in a cumbersome but workable process that served all parties.

Even if it could be argued that the prosecutor committed misconduct in obtaining the asset freeze and then objecting to certain disbursements from the conservatorship, Krogmann cannot demonstrate prejudice. The severity and pervasiveness of the misconduct was not so extreme. Although the asset freeze prevented Krogmann from posting bond and obtaining a jury consultant, those two examples did not render the trial process unfair. As to not being able to post bond, Krogmann's attorneys were not hampered by that fact. Nadler testified that not having Krogmann out on bond was helpful in that he knew where Krogmann would be at all times. PCR Exh. 3, p. 23, lines 6-16; App. 161. Nadler could not say that having Krogmann out on bond would have actually helped with the defense. PCR Exh. 3, p. 23, lines 6-16; App. 161. Brown thought it was "possible" that it might have been better for Krogmann to be released to aid in his defense, however, it did not get to the point where Brown thought it necessary to revisit the bond issue again. PCR Exh. 2-1, p. 65, lines 1-11; App. 129. Moreover, Brown met with Krogmann

weekly in jail and had a great deal of personal contact with him despite Krogmann not being able to post bond. PCR Exh. 2-1, p. 84, lines 18-25; App. 132.

Similarly, not being able to hire a jury consultant does not amount to "severe and pervasive" misconduct. Although counsel would have liked to have had a consultant, Brown was more than able to select a jury on his own given experience in criminal defense matters. PCR Exh. 2-1, p. 5, line 12 through p. 7, line 22; App. 118. Further, the jury consultant Brown wanted to hire was a psychologist and even Brown had to admit that an attorney would provide more value and strategic input than a jury consultant. PCR Exh. 2-2, p. 109, line 20 through p. 110, line 6; App. 139-40.

The asset freeze led to Krogmann creating a *voluntary* conservatorship so that he could conduct his affairs. Pet. For Conservator (4/13/09); App. 452-53. The asset freeze was not central to the issue in the case. The asset freeze did not impact the issue of whether Krogmann shot his former girlfriend in her home. The most significant factor for determining whether a defendant has been prejudiced is the strength of the State's evidence. *State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007). The State had compelling, if not

overwhelming, evidence against Krogmann. Krogmann and Jean Smith were the only two people in her house the morning of March 13, 2009. One person (Krogmann) brought a gun and one person (Smith) was shot. Given the evidence, there is no reason to believe the prosecutor committed misconduct. If there is no misconduct, Krogmann cannot show that counsel breached a duty.

2. Prejudice

Krogmann must also demonstrate prejudice. To do so, he must establish that had counsel challenged the asset freeze based upon prosecutorial misconduct, the district court would have agreed and dissolved the asset freeze. As set forth above, there is no basis from which a court would have found the prosecutor committed misconduct. Moreover, even if the asset freeze had been dissolved, and he would have been out on bond or retained a jury consultant, Krogmann cannot show that the outcome of the proceedings would have been different. As set forth above and incorporated by reference herein, the State's case against him is compelling. Jean Smith testified that he former boyfriend, Krogmann, who was distraught that Smith ended their relationship, shot her three times in her home

on the morning of March 13, 2009. *Krogmann*, 804 N.W.2d at 520. There is no prejudice.

3. Structural error

Again, Krogmann claims that this is an instance of structural error. For the reasons set forth in section I(A) (3) and incorporated herein, structural error does not apply. Krogmann was never without the benefit of counsel either actively or constructively. This claim must fail.

II. Counsel Effectively Represented The Defendant At Trial.

Error Preservation

The State does not contest error preservation. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (a claim of ineffective assistance of counsel is an exception to the general rule of error preservation).

Standard of Review

Appellate review of postconviction proceedings is reviewed for correction of errors at law. Iowa R. App. P. 6.907. To the extent that Siemer alleges counsel's ineffectiveness, review is de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

Merits

Krogmann also claims counsel was ineffective in "raising and presenting the mental health defense" and in failing to introduce a 911 call Krogmann made. Because Krogmann cannot demonstrate either a breach of duty or prejudice from counsel's alleged deficiencies, his claim must fail.

A. Mental health defense.

1. Breach of duty

Krogmann claims counsel ineffective in failing to put forth a stronger mental health defense. At trial, counsel sought to defend the case as one of diminished capacity. In support of this defense, Krogmann testified that beginning in his twenties and thirties, he began to suffer from anxiety and depression. Trial Tr. p. 445, lines 3-10; App. 385. He had been treated by a psychiatrist in the past and had been prescribed "antipsychotic" drugs. Trial Tr. p. 445, line 17 through p. 446, line 20; App. 385-86. Krogmann said he was "manic bi-polar" and suffered from "bi-polar depression." Trial Tr. p. 446, line 21 through p. 448, line 11; App. 386-88. He had been hospitalized for suicidal episodes when he felt "helpless." Trial Tr. p. 448, lines 12-23; App. 388. Krogmann claimed he was "suffering from bi-polar and depression" on the date he shot Jean Smith. Trial

Tr. p. 462, lines 22-24; App. 394. His expert, Dr. Gallagher, testified that at the time of the incident, Krogmann was feeling poorly:

> Couldn't sleep very well, he was quite despondent, he was distraught about the breakup of his relationship with his lady friend, Jean Smith, said he couldn't think straight.

Trial Tr. p. 554, lines 10-19; App. 434. Dr. Gallagher opined that as Krogmann's bipolar disorder and depression possibly influenced his intent on the day of the shootings. Trial Tr. p. 554, lines 20-25; App. 554.

Now, Krogmann contends counsel should have retained another or more experts who would have had a stronger opinion on the effects his mental health issues had on him that day. Def. Brief at 40. Though Krogmann found one expert who had a slightly stronger opinion on how his mental illness affected him, he cannot show that counsel's actions fell outside the range of normal competence. Counsel believed that Dr. Gallagher was a "good" and qualified witness, who would provide testimony to support the diminished responsibility defense. PCR Exh. 2-3, p. 12, line 17 through p. 14, line 3; App. 147-48. Brown testified that Dr. Gallagher had experience working for the defense and the prosecution which made him a more credible witness. PCR Exh. 2-3, p. 12, line 17 through p. 14, line 3;

App. 147-48. He also thought Dr. Gallagher had excellent credentials. PCR Exh. 2-3, p. 12, line 17 through p. 14, line 3; App. 147-48. The fact that Krogmann would have liked to have had more witnesses to testify to the same thing does not establish a breach of duty. Counsel had a plan and executed that plan with an expert he found to be competent and who provided a sound basis for the defense. No breach of duty occurred.

2. Prejudice.

Krogmann must also demonstrate prejudice. To do so, he must show that had another or more experts been called to testify on his behalf, he would not have been convicted of attempted murder and willful injury. As set forth above and incorporated by reference herein, the case against Krogmann is strong. Not only does the evidence establish that Krogmann was the shooter, but it also demonstrates that he was fully aware of what he was doing when he brought a loaded .44 revolver to Smith's home, shot her three times, and refused to call for help after each shot. Krogmann cannot demonstrate prejudice given the evidence.

B. Trial strategy.

1. Breach of duty

Krogmann also contends that counsel was ineffective in failing to move for a mistrial following a question from the prosecutor, in failing to introduce a 911 call from Krogmann, and in failing to obtain Krogmann's mental health records. Counsel's decisions in relation to all of these claims were reasonable under the circumstances of the case.

First, Brown's decision not to move for a mistrial after the prosecutor asked Krogmann if he "shot anybody today?" was not a breach of duty. Counsel objected to the question, the prosecutor withdrew the question, and the court sustained the objection. Trial Tr. p. 463, line 20 through p. 464, line 12; App. 395-96. Brown took the proper remedial action when he objected. Trial Tr. p. 463, line 20 through p. 464, line 12; App. 395-96. Brown viewed the question as a "cheap shot" and thought the jury would feel the same way about the question. PCR Exh. 2-2, p. 124, line 1 through p. 125, line 16; App. 143. He thought the question would backfire on the prosecution and elected not to move for a mistrial

for this reason. PCR Exh. 2-2, p. 124, line 1 through p. 125, line 16; App. 143.

Brown's decision not to introduce the 911 tape was also a strategic one. Brown described the 911 tape as an "interesting strategic issue." PCR Exh. 2-2, p. 121, line 13 through p. 123, line 24; App. 142-43. Brown crafted the defense as one of diminished capacity. PCR Exh. 2-2, p. 121, line 13 through p. 123, line 24; App. 142-43. Given Krogmann's long history of mental illness including bi-polar disorder and depression, Brown tried to have Krogmann's mental health issues serve as the basis for his actions. PCR Exh. 2-2, p. 121, line 13 through p. 123, line 24; App. 142-43. Brown thought that if he introduced the 911 call from Krogmann, the jury would find that Krogmann understood the consequences of his actions – that he had done something wrong-- and that would undermine the defense. PCR Exh. 2-2, p. 121, line 13 through p. 123, line 24; App. 142-43. Brown said, "strategically, I did not think that would have been a good thing to do." PCR Exh. 2-2, p. 123, lines 6-7; App. 143.

Finally, Krogmann asserts that counsel breached a duty in "failing to obtain Krogmann's mental health records in support of

his mental health defense." Def. Brief at 41. This statement is not supported by the record. According to Brown's deposition testimony, he obtained Krogmann's mental health records and did *not* want to introduce those records because of what was contained in them. PCR Exh. 2-1, p. 43, lines 4-12, p. 45, line 10 through p. 47, line 11; App. 123-24. Brown thought that the contents of Krogmann's medical records would have hurt rather than helped the defense. PCR Exh. 2-1, p. 45, line 10 through p. 47, line 11; App. 124.

Counsel's decisions not to move for a mistrial, not to introduce Krogmann's 911 call, and his decision not to introduce Krogmann's medical records were strategic. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel). Krogmann has not shown counsel breached a duty.

2. Prejudice

Krogmann must also show prejudice. To do so, he must demonstrate a reasonable probability of a different outcome as to each claim. This he cannot do.

Even if Brown had moved for a mistrial following the prosecutors question of "shot anybody today?" Krogmann cannot establish it would have been granted. As the Iowa Supreme Court noted in *State v. Krogmann*, 804 N.W.2d 518, 526-27 (Iowa 20011), the prosecutor's question was "directed toward a legitimate trial theme" and was an isolated incident. Based upon the strength of the state's case as set out above, Krogmann cannot demonstrate that the court would have granted a mistrial on this single incident. If anything, the question was detrimental to the State as it would have offended the jury and benefitted him. *Id.* at 527.

Additionally, Krogmann cannot demonstrate prejudice from counsel's decision not to introduce the 911 tape or his medical records. Even if the 911 tapes and his medical records had been introduced, Krogmann cannot show a reasonable probability of a different outcome given the strength of the State's case. This is especially true when the 911 tapes and the medical records bolstered the State's case that Krogmann was fully aware of what he was doing when he shot Jean Smith. Counsel

effectively represented Krogmann. The postconviction court must be affirmed.

III. The Prosecutor Did Not Commit Misconduct.

Standard of Review

Appellate review of postconviction proceedings is reviewed for correction of errors at law. Iowa R. App. P. 6.907; *Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998).

Preservation of Error

Krogmann asserts that the prosecutor committed numerous instances of misconduct when he asked Krogmann whether he called 911 for help "knowing, and having in his possession, the 911 tapes" showing that Krogmann had called for help," in contesting Krogmann's diminished capacity defense at trial while at the same time asserting Krogmann needed a conservatorship to control his assets. Def. Brief at 42-43. These claims cannot be raised on appeal.

Krogmann's outright challenges to the prosecutor's actions cannot be properly brought in this appeal because they were not properly raised either on direct appeal or as a claim of ineffective assistance of counsel. Iowa Code § 822.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. *Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application*.

Iowa Code § 822.8 (emphasis added). Generally, a claim not raised on direct appeal cannot be raised in a postconviction relief proceeding unless the applicant can demonstrate a sufficient cause or reason for not properly raising the issue previously. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Ineffective assistance of counsel may be sufficient reason for the failure to raise the claims below. *Id.* at 152. Notably, Krogmann, has neither argued nor demonstrated sufficient reason for the failure to properly raise these claims. As such, they should not be considered because they have been improvidently raised.

It is also important to note that Krogmann raised a claim of prosecutorial misconduct on direct appeal and this claim was addressed by the Iowa Supreme Court. *Id.* at 526. He cannot now raise a new claim of prosecutorial misconduct without any reason or

explanation for not having raised it before. These claims should not be considered.

The Merits

Krogmann claims the prosecutor committed misconduct when he cross-examined him about calling for help when he knew that a 911 call Krogmann made existed. He also contends it was misconduct for the prosecution to challenge his diminished capacity defense and also assert he needed a conservatorship. Because Krogmann cannot demonstrate misconduct, his claim must fail.

As set forth above, a party claiming prosecutorial misconduct must show misconduct, and that the misconduct resulted in prejudice to such an extent the defendant was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). A party is entitled to a new trial based on prosecutorial misconduct only if the party has shown prejudice. *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002). Prejudice in this context requires the court to consider:

> (1)the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures and; (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 869. The prosecutor's actions do not rise to the level of misconduct.

Cross-examination

The prosecutor's questions to Krogmann regarding the 911 call do not necessarily challenge whether Krogmann made a 911 call. Trial Tr. p. 472, line 2 through p. 474, line 11; App. 398. Rather, the questions were directed at the fact that he called his son, Jeff, first before calling 911. Trial Tr. p. 472, line 2 through p. 474, line 11; App. 398-400. The prosecutor inquired:

> PROSECUTOR: Did you call 911?
>
> KROGMANN: Yes, I did.
>
> PROSECUTOR: When, sir?
>
> KROGMANN: I – I don't know exactly what order. I had to find her cell phone. I don't know what time. What do you mean by that?
>
> PROSECUTOR: Sir, before you called 911, you called your son; isn't that correct?
>
> KROGMANN: Yes, I did.
>
> PROSECUTOR: And before you called 911, Michael showed up and chased you out of the house; isn't that correct?
>
> KROGMANN: That's not correct.

> PROSECUTOR: Is it your testimony that you called 911 before you left the house?
>
> KROGMANN: That is correct.
>
> PROSECUTOR: With what telephone?
>
> KROGMANN: With Jean's telephone?
>
> PROSECUTOR: Okay. That's your testimony?
>
> KROGMANN: It's in the records.
>
> PROSECUTOR: Okay. And whenever you called 911, that was after you had called Jeff?

Trial Tr. p. 472, lines 2-22; App. 398. The prosecutor then inquired about Krogmann's conversation with his son and his belief that he was in shock from the incident. Trial Tr. p. 472, lines 23 through p. 474, line 11; App. 398-400. From this record, it cannot be said that the prosecutor committed misconduct when he asked Krogmann these questions. The prosecutor did not deny that Krogmann called 911. Trial Tr. p. 472, line 2 through p. 474, line 11; App. 398-400. What he did do was to point out to the jury that Krogmann's first response was not to call for help for the woman he had just shot, but was to call his own son about the incident. Trial Tr. p. 472, line 2 through p. 474, line 11; App. 398-400. This is not misconduct but an example of a sound cross-examination.

Further, Krogmann cannot demonstrate prejudice from this line of questions. These questions covered two pages of a fairly lengthy trial. In this regard these few questions were neither severe nor pervasive. The significance of these questions had some impact on Krogmann's defense, however, it just highlighted Krogmann's disregard for his victim which was consistent with his actions in shooting his defenseless victim three times. The State's case against Krogmann was strong and these questions had little impact on the otherwise compelling case against him. Moreover, defense counsel did not want the 911 call to be introduced because he felt it was detrimental to his defense. If it was inconsistent with his defense theory, Krogmann cannot demonstrate prejudice.

Diminished capacity and the conservatorship

Krogmann also contends that it was misconduct for the prosecutor to attack his diminished responsibility defense while at the same time assert he needed a conservatorship. Krogmann is simply wrong in this assertion. Krogmann asserted the diminished responsibility defense and voluntarily petitioned for the conservatorship. This is not an instance in which the State acted contrary to its own assertions. Rather, the defense and the voluntary

conservatorship were consistent with each other. The State merely attempted to refute the defense and played no role in the creation of the conservatorship.

Krogmann relied on the diminished responsibility defense to negate the element of specific intent. *State v. Buchanan*, 207 N.W.2d 784, 789 (Iowa 1973). This defense notwithstanding, the State still had to prove that Krogmann had specific intent. *Id.* The State did so in this case by challenging Krogmann's mental state at the time of and immediately after the incident. The State pointed out that Krogmann knew what he was doing because he was concerned for himself. He called his son first before doing anything to help his victim, Jean Smith.

Krogmann, on the other hand, voluntarily petitioned for the appointment of a conservator. Pet. For Conservator (4/13/09); App. 452-53. The probate court granted Krogmann's request for a conservator after finding Krogmann to be "incapacitated and [] unable to carry on business and make decisions and transactions for the foreseeable future." Order Appointing Conservator (4/13/09); App. 454-55. The State did not act to create the conservatorship. That was entirely up to Krogmann so he could conduct his own

affairs. Pet. For Conservator (4/13/09), Order Appoint. Conservator. (4/13/09); App. 452-55.

On this record, Krogmann cannot demonstrate the State committed misconduct. The State only challenged the defense in an effort to prove its case; something that the State is required to do in a criminal prosecution. Likewise, there can be no prejudice to Krogmann because the challenge to the defense was reasonably related to the fighting issue in the case. The strength of the State's case must also be considered. As set forth above, the State's case against Krogmann was strong. *Krogmann*, 804 N.W.2d at 520. No prejudice resulted from the prosecutor's challenge to Krogmann's defense.

IV. The Defendant's Consecutive Sentences For Attempted Murder And Willful Injury Do Not Violate Double Jeopardy.

Preservation of Error

The State does not contest error preservation. *State v. Love*, 858 N.W.2d 721, 723 (Iowa 2015).

Standard of Review

Review of an illegal sentence for lack of merger is for correction of errors at law. *Id.*

The Merits

Krogmann contends that the district court should not have imposed consecutive sentences for both attempted murder and willful injury. Krogmann argues that these two sentences should have merged and the court's failure to merge the sentences violates double jeopardy under the federal constitution as well as Iowa Code section 701.9. Krogmann's claim is not supported by the law.

Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9. Our supreme court has held that this statute "codifies the double jeopardy protection against cumulative punishment." *State v. Gallup,* 500 N.W.2d 437, 445 (Iowa 1993). Thus, a court looks to legislative intent to determine whether merger is required under section 701.9. *See id.* Legislative intent is indicated, in part, by whether the crimes at issue meet the impossibility test for lesser-included offenses. *State v. Shearon*, 660 N.W.2d 52, 55-56 (Iowa 2003); *State v. Halliburton,* 539 N.W.2d 339, 344 (Iowa 1995)

(legislative intent is indicated, in part, by whether the crimes at issue meet the legal elements test for lesser-included offenses); *see generally Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). To apply the impossibility test, a court looks to:

> whether if the elements of the greater offense are established, in the manner in which the State sought to prove those elements, then the elements of any lesser offense have also necessarily been established." And it is not necessary that the elements of the lesser offense be described in the statutes in the same way as the elements of the greater offense.

Id. at 895 (quoting *State v. Turecek,* 456 N.W.2d 219, 223 (Iowa 1990)); *State v. Miller*, 841 N.W.2d 583, 589 (Iowa 2014).

A comparison of the respective elements of attempted murder and willful injury demonstrates that the two offenses have disparate elements. Attempted murder requires a defendant (1) to commit an act (2) which the defendant expects to set in motion a force or chain of events which would cause or result in the death of the victim. Iowa Code § 707.11. Willful injury requires a defendant to (1) commit an act (2) with the specific intent to cause a serious injury (3) and the

acts caused either a serious or bodily injury to the victim. Iowa Code § 708.4.

This court has long held that willful injury is not a lesser included offense of attempted murder. *State v. Clarke*, 475 N.W.2d 193, 194-95 (Iowa 1991); *State v. Adcock*, 426 N.W.2d 639, 640 (Iowa Ct. App. 1988). The distinguishing element is proof of a serious injury, required for a willful injury conviction but not attempted murder. *Clarke*, 475 N.W.2d at 194.

The rationale underlying these decisions is that "the court must look at the statutory definitions rather than the facts in the particular case to determine whether the lesser offense is necessarily included. *Id.* at 195. The general rule is that:

> Where the same act or transaction constitutes a violation of two distinct provisions, the test to be applied to determine whether there are two offense or only one is whether each provision requires proof of a fact that the other does not. . . [T]he constitutional prohibition against double jeopardy is directed to the identity of the offense and not to the act. . . If each statutory provision requires proof of a fact that the other does not, they are not the same, even though there may be a substantial overlap in the proof offered to establish the crimes.

Id. (citing 21 Am.Jur.2d *Criminal Law* §279 at 487-88 (1981). Merger does not apply in this case when the offenses have disparate elements and the crimes are distinct.

Krogmann argues, however, that recent decisions dealing with "unit of prosecution" cases support his claim that his consecutive sentences violate double jeopardy because he is being punished twice for the same crime. Def. Brief at 46-48. Krogmann is incorrect in this assertion because the crimes are different and the elements of those crimes are different.

Even if this court considers the unit of prosecution cases, they are of no assistance to Krogmann. In *State v. Velez*, 829 N.W.2d 572, 581 (Iowa 2013), this court discussed a series of tests to determine whether multiple acts could support multiple counts. These are the separate acts test, the break in the action test, and the completed acts test. Id. at 581-83. That is not a concern in this case because Krogmann was charged with separate crimes – attempted murder and willful injury—and the unit of prosecution cases do not apply in a situation such as this. Even if the unit of prosecution cases do apply, the evidence establishes that each shot represented a separate act because after each shot, Krogmann spoke to Smith and refused her aid.

Smith testified that when Krogmann was in her home, he raised the .44 revolver and shot her initially in the stomach. Trial Tr. p. 207,

lines 1-24, p. 379, line 12 through p. 380, line 16; App. 336, 382-83. She asked him to call 911 but he refused. Trial Tr. p. 207, lines 1-18; App. 336. Krogmann told Smith he left his phone in his car so he would not have to call for help. Trial Tr. p. 207, lines 1-18; App. 336.

Krogmann then shot Smith again, this time in the right arm. Trial Tr. p. 207, lines 19-25; App. 336. Smith again pleaded with Krogmann to call for help but he refused. Trial Tr. p. 208, lines 1-7; App. 337. Krogmann then told Smith he was not going to go to jail for attempted murder. Trial Tr. p. 208, lines 1-7; App. 337.

Krogmann then shot Smith a third time. Trial Tr. p. 208, lines 8-22; App. 337. The shot went through the spine and caused her to fall down. Trial Tr. p. 208, lines 8-22; App. 337. Krogmann again refused to call for assistance. Trial Tr. p. 208, lines 8-22; App. 337. He did remark, however, that it was taking her a long time to die. Trial Tr. p. 211, lines 6-16; App. 340. In light of these facts, there was a break in the action between each shot when Krogmann refused to call 911 despite the severely injured woman's pleas. Given that the elements of the respective offenses contain disparate elements and each shot represents a separate act, merger does not apply and there

has been no double jeopardy violation. Krogmann's sentence must stand.

CONCLUSION

The State respectfully requests this court deny Krogmann relief on all of his postconviction claims.

REQUEST FOR NONORAL SUBMISSION

This case involves routine claims alleging ineffective assistance of counsel, prosecutorial misconduct, and a double jeopardy violation. Oral argument is not necessary to dispose of these claims. In the event argument is scheduled, the State requests to be heard.

Respectfully submitted,

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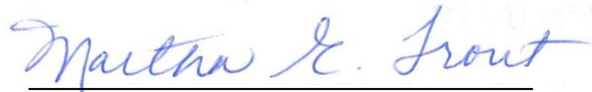

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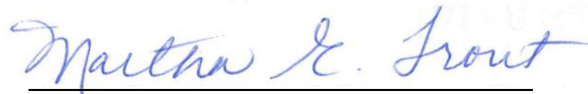

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