

IN THE COURT OF APPEALS OF IOWA

No. 0-379 / 08-1504
Filed August 11, 2010

DONALD LYNN BOSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Plymouth County, Gary E. Wenell,
Judge.

Appeal from the denial of postconviction relief. **AFFIRMED.**

Michael Johnson, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor,
J., takes no part.

SACKETT, C.J.

Donald Boss appeals from the district court's denial of his application for postconviction relief. He contends the court erred in granting summary judgment on his claims of prosecutorial misconduct and in not finding he received ineffective assistance of trial and appellate counsel. We affirm.

I. Background.

In 2002 Boss was convicted of the murder of his son, Timothy.¹ In his direct appeal, he claimed counsel was ineffective in several respects, including “in the manner in which he disclosed the location of Timothy’s body.” He also claimed the trial court erred in denying his motion for change of venue and applied the wrong standard in considering his motion for new trial. This court affirmed the conviction, concluding the trial court did not abuse its discretion in denying the motion to change venue and “used the proper contrary-to-the-weight-of-the-evidence standard” in ruling on the motion for new trial. We preserved for possible postconviction proceedings the ineffective assistance claim concerning the disclosure of the child’s body, and found the defendant did not prove counsel was otherwise ineffective. *State v. Boss*, No. 03-0092 (Iowa Ct. App. Jan. 28, 2004).

Boss filed a pro se application for postconviction relief in March of 2005. In September of 2007, the State filed a combined motion to dismiss and motion for summary judgment and a second motion for summary judgment. In October

¹ The details of the evidence supporting the conviction are set forth extensively in the direct appeal. See *State v. Boss*, No 03-0092 (Iowa Ct. App. Jan. 28, 2004). Except to the extent necessary to address the claims in this appeal, we will not repeat them here.

2007, following appointment of counsel, Boss filed an amended application for postconviction relief. In January 2008 the State filed an amended answer and renewed motion to dismiss.

Following a February 15 hearing on the motion, the court sustained the State's motion in part and denied it in part in a ruling issued on February 26. It determined the State had established its entitlement to summary judgment on the prosecutorial-misconduct claims. On February 26 and 27, the court heard the remaining claims. It denied Boss's application for postconviction relief in a ruling filed on August 28, 2008. This appeal followed.

II. Scope of Review.

Generally, postconviction relief proceedings are reviewed for correction of errors at law. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). The postconviction court may grant summary judgment in a postconviction action if "there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6 (2007). The rules of civil procedure apply to actions for postconviction relief. *Id.* § 822.7 Ineffective-assistance-of-counsel claims are constitutional in nature and, therefore, our review is de novo. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). "In order for a defendant to succeed on a claim of ineffective assistance of counsel, the defendant must prove: (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). We may dispose of the defendant's ineffective assistance claims under either prong. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

III. Merits.

A. *Ineffective Assistance by Disclosure of the Location of the Body.* This issue was preserved for postconviction proceedings in the direct appeal because the record was inadequate to address it. Both Boss and trial counsel testified in the postconviction proceedings. Trial counsel's strategy was succinctly stated, "Blame Lisa" (Boss's wife).

The court observed the disclosure "may have resulted in significant prejudice at trial," but resolved the claim by finding the attorneys "have shown enough evidence that they made a tactical decision in support of a legal strategy that could have been aided by the disclosure of the body." The court reasoned:

What the defense team has presented to the court is an overall strategy focused on blaming or at least raising significant questions about the involvement of Lisa Boss in Timothy's death. It appears that evidence they hoped would support that theory would have been located where the body was discovered. This evidence included [Lisa's] cigarette butts; evidence that Timothy died as a result of an overdose [Lisa administered all drugs]; and the general implication that Boss was cooperating by providing the body. In addition, they were trying to "freeze" Lisa Boss's damaging statements, a tactic that even Boss stated was effective for a bit. The fact these theories were not successful in securing an acquittal for Boss does not necessarily mean they were ineffective. The fact other lawyers may have decided not to reveal such a piece of evidence does not mean trial counsel was acting incompetently. Trial counsel is only ineffective when their conduct is so egregious that they failed an essential duty. The court does not believe this is such a case. The legal defense team had a strategy, though admittedly a novel one, to disclose the body to help with their overall strategy of placing the blame on parties or events other than Boss. The court, after hearing the defense team's rationale for their actions believes they had a legitimate strategy in mind, though it also believes such a strategy may have been misguided. A trial strategy that is reasonable, though imperfect and ultimately unsuccessful is not ineffective assistance of counsel.

The test for ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must prove counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role the Sixth Amendment envisions. *Id.*, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma*, 626 N.W.2d at 145. We presume the attorney performed competently, and the applicant must present "an affirmative factual basis establishing inadequate representation." *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma*, 626 N.W.2d at 143.

Boss asserts, "There is no rational explanation, strategic or tactical, for the disclosure of the burial site of Timothy during [the bond review] proceeding and in this manner." We, like the postconviction court, disagree. It is clear from the record that defense counsel was concerned that Lisa would reveal the location of the body. Counsel also was concerned about the media coverage of the case and Lisa's statements in the media. We conclude there was a rational explanation for disclosing the location of the body as quickly as possible to "beat

[Lisa] to the punch.” While the ultimate effect of revealing the location of Timothy’s body may have been prejudicial to Boss’s defense, we agree with the postconviction court that defense counsel had a “legitimate strategy in mind” that was based on extensive experience, considered deliberation, discussion with the defendant, and the unfolding circumstances as the case proceeded. This is not a failure in an essential duty. Boss has not overcome the strong presumption that his counsel’s performance fell within the wide range of reasonable professional assistance. See *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94.

Boss further asserts the disclosure “raises serious questions concerning disclosure of privileged communications.” The record shows that defense counsel had Boss disclose the location of the body only with his informed consent. There was discussion about the disclosure but there was no disclosure until the final agreement by Boss. Boss acknowledged considerable discussion and acknowledged eventually being convinced. He conceded consenting to the disclosure based on the advice of counsel, even though he now claims to have doubted the rationale. Boss’s citation to *State v. Wemark*, 602 N.W.2d 810 (Iowa 1999), is inapposite. In *Wemark*, counsel’s tactical decisions were based on a faulty premise that disclosure was required under the Iowa Code of Professional Responsibility in effect at the time. See *Wemark*, 602 N.W.2d at 816-17 (discussing the relevant ethical and legal obligations and counsel’s mistake). “Wemark was informed by his defense counsel that the location of the knife must be disclosed, and tactics were developed as a means to deal with the

disclosure.” *Id.* at 817. In the case before us, however, counsel correctly understood the relevant law and ethical rules. Disclosure was a voluntary, informed, considered, tactical action. We conclude the disclosure of the location of the body was not ineffective assistance. See *Ledezma*, 626 N.W.2d at 145 (disposing of an ineffective-assistance claim upon lack of proof of either prong).

B. Ineffective Assistance Concerning Prosecutorial Misconduct. Boss contends the postconviction court erred in granting summary judgment on his ineffective-assistance claims concerning prosecutorial misconduct. He alleges defense counsel was ineffective by failing to object to prosecutorial misconduct in the State’s opening statement and closing argument and appellate counsel was ineffective by failing to raise or preserve the claim for our review.

In its ruling on the cross motions for summary judgment, the postconviction court first addressed the issues of whether the various ineffective assistance claims were untimely and whether they were not preserved for review because they were not raised on direct appeal. The court found the claims were not time-barred and that they did not need to be raised on direct appeal. See Iowa Code § 814.7(2).² Concerning the defendant’s claims of prosecutorial misconduct, the court found “the [defendant] agrees there is no question of fact, and believes a decision can be made at this stage.” The court ruled “there was no evidence before the court of prosecutorial misconduct and therefore summary judgment is appropriate” on the ineffective-assistance claims concerning prosecutorial misconduct.

² Subsection 2 was added to section 814.7 in 2004.

Boss claims trial and appellate counsel were ineffective in not challenging the prosecutor's use of the words "lie" and "liar" in closing arguments when referring to the defendant, his testimony, and other statements he made. He argues "the prosecutor improperly expressed his personal opinion on [Boss's] credibility and guilt and improperly disparaged Boss's character." He does not challenge the postconviction court's determination that the ineffective-assistance claims were properly before it for resolution. Accordingly, we do not consider whether the claims were time-barred or not preserved.

After the supreme court's decision in *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003), it can be said "that Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." The trial in the case before us occurred in late 2002. *Graves* was issued in September of 2003.

In analyzing Boss's ineffective-assistance claim, we first assess whether the record demonstrates, as a matter of law, the existence or absence of a meritorious due process violation. *Graves*, 668 N.W.2d at 869. "The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct." *Id.* A prosecutor "is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). A prosecutor "may draw conclusions and argue all permissible inferences" that "may reasonably flow from the record" and that "do not misstate the facts." *Id.* "The governing principle does not preclude all personalized remarks; it merely precludes those that do not appear to be based

on the evidence.” *State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983). We answer three questions to determine whether the prosecutor’s remarks were improper.

(1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor’s statements that the defendant lied conveyed to the jury as the prosecutor’s personal opinion of the defendant’s credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Graves, 668 N.W.2d at 874-75.

The postconviction court’s ruling cites to the *Graves* prohibition on the use of terms like “liar” and concluded,

The prosecuting attorney kept his remarks consigned to talking about incidents where the defendant had admitted mistruths. He did not tell the jury that the defendant was lying, and he did not call the defendant a “liar.” Therefore, the prosecutor did not improperly invade the province of the jury. The jury was instead provided with statements that Defendant had admitted to “lying” in the past, and let the jury make its own inference as to whether that meant Defendant was lying in his testimony at trial. This does not rise to the level of inflammatory language forbidden by *Graves*. Therefore, the court rules that there is no evidence before the court of prosecutorial misconduct and therefore summary judgment is appropriate on those claims.

From our review of the limited record of the State’s closing argument,³ we agree with the postconviction court that there was not prosecutorial misconduct,

³ Although the defendant submitted as exhibits the transcript of the trial from jury selection through the close of evidence, totaling nearly 1700 pages, conspicuously absent is the transcript of the closing arguments. The closing argument exhibit, containing seven pages selected from what appears to be at least sixty pages of transcript, is all that was before the postconviction court. We question why, if one of the

so summary judgment was proper on the ineffective-assistance claim based on failure to object to prosecutorial misconduct. The jury could legitimately infer from the evidence that the defendant lied—he admitted doing so repeatedly during his testimony at trial. See *Graves*, 668 N.W.2d at 874. The prosecutor’s remarks were not conveyed to the jury as his personal opinion, but rather were related to specific evidence and admissions showing the defendant had been untruthful. See *id.* The argument was made in a professional manner and did not unfairly disparage the defendant or tend to cause the jury to decide based on emotion instead of the evidence. See *id.* at 874-75. We affirm the postconviction court’s grant of summary judgment on this issue.

C. Remaining Ineffective-Assistance Claims. Boss contends trial counsel was ineffective in (1) not succeeding on a motion for change of venue, (2) not objecting to the qualifications of the medical examiner, and (3) not “effectively” cross-examining a witness.

(1) *Change of Venue.* In seeking a change of venue, trial counsel offered hundreds of pages of exhibits showing media coverage of the case. Boss argues counsel did not focus enough on prejudice, but instead focused too much on the pervasiveness of the coverage. He bases his argument on statements from the trial court that it felt they were spending a lot of time on pervasiveness when that was not disputed by the State and that some of the evidence was cumulative. Yet in his brief he acknowledges the exhibits submitted by counsel “contained a

defendant’s primary claims related to allegations of prosecutorial misconduct in closing arguments, the transcript of the prosecutor’s closing was not submitted for consideration.

wealth of material exhibiting prejudice.” The exhibits included the results of a survey of potential jurors about the effect of publicity on their view of the issues.

On direct appeal, this court concluded the defendant failed to prove actual prejudice, noting the jury selection did not show actual prejudice. Although this claim is raised under an ineffective-assistance rubric, the result is the same. In order to establish ineffective assistance, the defendant has to show both failure in an essential duty and prejudice. If the lack of a change in venue did not result in prejudice, then trial counsel’s unsuccessful attempt to seek a change in venue did not result in prejudice. This claim fails. See *State v. Leckington*, 713 N.W.2d 208, 218 (Iowa 2006) (“Without proof of prejudice, [the] ineffective-assistance claim necessarily fails.”).

2. *Medical Examiner’s Qualifications and Report.* Boss contends trial counsel was ineffective in failing to object to the medical examiner’s report based on the alleged lack of qualifications of the medical examiner and based on insufficient facts to support the conclusions in the report.

Iowa Code section 691.5 sets forth the qualifications for a state medical examiner:

The state medical examiner shall be a physician *and surgeon* or osteopathic physician *and surgeon*, be licensed to practice medicine in the state of Iowa, and be board certified or eligible to be board certified in anatomic and forensic pathology by the American board of pathology.

(Emphasis added.) Boss contends there is no evidence in the record that the medical examiner “is or was a surgeon.” He does not claim that the medical examiner was not a surgeon, but only that the record does not prove he was and trial counsel should have objected to his qualifications.

While we acknowledge counsel could have objected, we see no reasonable probability the outcome of the trial would have been different if counsel had objected. See *State v. Lyman*, 776 N.W.2d 865, 878 (Iowa 2010). The record contains substantial evidence that the medical examiner was qualified under the statute, although the term “surgeon” does not appear in his curriculum vitae. The defendant has not shown the probability of a different result “sufficient to undermine [our] confidence in the outcome.” See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Boss also contends counsel erred in not challenging the medical examiner’s report as lacking evidence to support its conclusions because it was based in part on statements from the victim’s siblings. He claims the conclusions in the report were merely speculation. The jury knew the evidence the medical examiner considered in arriving at his conclusions. The jury also knew about any inconsistencies in the accounts of the various children. The weight to be given to any of the evidence is for the jury to determine. We conclude counsel was not ineffective in not objecting to the report.

3. *Ineffective Cross-examination of a Witness.* Boss points to inconsistencies in the various statements made by Claxton Boss. He acknowledges that trial counsel challenged the witness’s credibility and impeached him using prior statements. He contends he is not second-guessing counsel’s actions and efforts, but contends “a line of questioning which linked Claxton’s continuously changing stories to new investigative disclosures would have had a meaningful impact on the jury and could likely have altered the

outcome of the trial.” He offers no evidence to support this contention. We conclude Boss has not demonstrated counsel failed in an essential duty or that prejudice resulted.

For the reasons set forth above, we affirm the decision of the postconviction court that denied relief.

AFFIRMED.