IN THE COURT OF APPEALS OF IOWA

No. 1-591 / 08-1793
Filed January 19, 2012

NAPOLEON HARTSFIELD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Napoleon Hartsfield appeals a district court's ruling denying his application for postconviction relief. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Napoleon Hartsfield appeals a district court's ruling denying his application for postconviction relief. He asserts the district court should have granted his application, raising several ineffective-assistance-of-counsel claims. We find Hartsfield did not establish his trial and appellate counsel were ineffective for failing to challenge his habitual offender enhancement because his prior convictions were felony convictions. Likewise, Hartsfield's allegation that his first criminal trial ended in a mistrial as a result of prosecutorial misconduct was not supported by the record, and his ineffective-assistance-of-counsel claim based upon this assertion fails. Hartsfield failed to prove both prongs of the *Strickland* test in any of his claims for ineffective assistance of counsel, and the district court properly dismissed his application. We therefore affirm.

I. Background Facts and Proceedings.

Napoleon Hartsfield was convicted of possession with intent to deliver a controlled substance (crack cocaine) under Iowa Code sections 124.401(1)(c)(3), 124.206(2)(d), and 703.1 (2001)[1], and possession of drug paraphernalia under Iowa Code section 124.414(2) and (3). Hartsfield's sentence was enhanced to a maximum of fifteen years based on his status as a habitual offender. *See* Iowa Code § 902.8. On November 5, 2003, Hartsfield filed a pro se application for postconviction relief. On August 31, 2004, he filed a pro se motion to supplement his original application. The matter came on for hearing on July 5,

[1] Hartsfield was also found guilty of failure to affix a drug tax stamp under Iowa Code sections 453B.1(3)(d), 453B.12, and 703.1. On direct criminal appeal, this court found there was insufficient evidence in the record to support Hartsfield's drug tax stamp conviction, reversed the conviction, and remanded for entry of judgment of acquittal on this count. *State v. Hartsfield*, No. 02-0744 (Iowa Ct. App. Aug. 13, 2003).

2007, February 29, 2008, and October 10, 2008. On October 27, 2008, the district court denied each of Hartsfield's twenty-two counts alleged in his original and supplemental applications. Hartsfield appeals.

II. Standard of Review.

Our review of an appeal from a denial of a postconviction relief application is generally for errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). Where a constitutional claim is asserted, our review is de novo. *King v. State*, 797 N.W.2d 565, 570 (Iowa 2011). "Thus, we review claims of ineffective assistance of counsel de novo." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Ineffective Assistance of Counsel.

Hartsfield asserts the postconviction court should have found his trial counsel was ineffective for several reasons. In order to prevail on an ineffective-assistance-of-counsel claim, Hartsfield must establish (1) his counsel failed to perform an essential duty and (2) prejudice resulted from such failure. *Lado*, 804 N.W.2d at 251 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L. Ed. 2d 674, 693 (1984)). The applicant must prove both elements by a preponderance of the evidence. *Id.* If the applicant makes an insufficient showing on either prong of the two-part test, we need not address both components. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). "We judge ineffective assistance of appellate counsel claims against the same two-pronged test utilized for ineffective assistance of trial counsel claims." *Ledezma*, 626 N.W.2d at 141.

"To prove that counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009). To establish prejudice, "the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Osborn*, 573 N.W.2d at 922 (internal quotations marks omitted).

A. Habitual Offender.

Hartsfield asserts that his trial counsel was ineffective for not challenging the habitual offender enhancement, arguing the State failed to prove he had two prior felony convictions. He further argues that his appellate counsel was ineffective for failing to pursue this issue on direct appeal. Hartsfield's sentence was enhanced after the State presented evidence of Hartsfield's prior felony convictions.[2] When a defendant is charged with a crime that imposes an enhanced penalty for prior convictions, a two-stage trial is implicated. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). In the first stage, the facts are limited to the current offense, with no mention of the prior convictions. *Id.* If the defendant is found guilty of the current offense, the defendant is entitled to a trial wherein the State must prove any prior convictions. *Id.*

[2] At the habitual offender hearing, the State provided evidence of prior convictions from Illinois and Michigan. In Illinois, Hartsfield was convicted of two robberies. Hartsfield originally received a suspended sentence on the first charge. When he was convicted of the second charge, his probation was revoked and he was sentenced to a concurrent five-year term of imprisonment. In Michigan, Hartsfield was convicted of breaking and entering, which carries a minimum term of two and one-half years, and a maximum term of ten years.

1. Represented by Counsel or Waiver of Counsel.

Hartsfield first argues the State failed to prove he was represented by counsel for his prior Illinois conviction, and therefore his trial counsel was ineffective because he "did not point this out to the district court." The State replies that Hartsfield's claim during his postconviction trial is not that he was actually unrepresented or failed to properly waive representation by counsel prior to the Illinois convictions, but only that the State failed to prove he was represented by counsel.

The Michigan conviction records clearly stated that Hartsfield was represented by counsel. The Illinois conviction records, however, do not indicate whether Hartsfield was represented by counsel. Hartsfield cites *Kukowski*, for the proposition that the State is required to show the defendant was represented by counsel, or waived counsel when it relies on a previous conviction to enhance a sentence. 704 N.W.2d at 691. We believe, however, that Hartsfield has misinterpreted our supreme court's ruling in *Kukowski*.

The flaw in Hartsfield's assertion finds its genesis in two somewhat differing opinions regarding which party has the burden of proving the applicant was represented by counsel or waived his right to counsel. In the 1969 case of *State v. Cameron*, 167 N.W.2d 689, 694 (Iowa 1969), our supreme found no merit to the defendant's claim that a prior, Michigan conviction was obtained without assistance of counsel. The court rejected defendant Cameron's reliance on *Burgett v. Texas*, 389 U.S. 109, 114–15, 88 S. Ct. 258, 262, 19 L. Ed. 2d 319, 324 (1967), which stated:

> Presuming wavier of counsel from a silent record is impermissible. To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case.

Cameron, 167 N.W.2d at 694. The court found *Burgett* factually different than *Cameron*, because in *Burgett*, one of the prior conviction certificates "definitely stated defendant was 'without counsel' and another certificate of the same conviction omitted the additional words 'without counsel.'" *Id.* The court then went on to cite an Eighth Circuit opinion interpreting *Burgett*, which held:

> We are inclined to believe that *Burgett* must be read as holding that where the record is silent as to whether an accused was furnished counsel at a critical stage *and where the accused introduces evidence tending to show that he was not in fact so represented*, the burden then shifts to the state to prove, by a fair preponderance of the evidence, that the accused was represented.

See id. (citing *Losieau v. Sigler*, 406 F.2d 795, 803 (8th Cir. 1969)) (emphasis added). The court then held that in light of the ruling in *Losieau*, which required defendant to first show he was not in fact represented, and because defendant Cameron failed to indicate that the conviction was obtained without assistance of counsel, Cameron's claim was without merit. *Id.*

In the 2005 *Kukowski* case, our supreme court did not adopt, but only referenced in dicta, certain language contained in defendant Cameron's argument in *State v. Cameron*. *Kukowski*, 704 N.W.2d at 691. The language referenced by the court and relied upon by Hartsfield is that "[t]he State must . . . establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." *Id.* We think Hartsfield's reliance on this proposition is misplaced because *Cameron* adopted a standard requiring the

defendant to first introduce evidence tending to show he was not in fact represented by counsel before the State is required to put forth evidence that the defendant was in fact represented by counsel. *Cameron*, 167 N.W.2d at 694.

Further explaining the *Cameron* decision, our supreme court set forth the proper burden of proof as, "the burden shifts to the State to prove the accused was represented *only after the accused first introduces evidence to show that he was not in fact represented*." *State v. Nelson*, 234 N.W.2d 368, 375 (Iowa 1975) (emphasis added). Therefore, while *Kukowski* requires the State to establish the defendant was represented by counsel or knowingly waived counsel for his prior convictions, *Nelson* explains that Hartsfield was first required to assert that he was not in fact represented, and then introduce evidence to support his assertion. *Kukowski*, 704 N.W.2d at 691; *Nelson*, 234 N.W.2d at 375. Only if Hartsfield first presented evidence that he was not in fact represented would the State be required to rebut this argument by proving Hartsfield was in fact represented. *Cameron*, 167 N.W.2d at 694.

This burden shifting recognizes the importance given to the integrity of the underlying judgments. The Supreme Court in *Parke v. Raley*, recognized that state courts are not prohibited from presuming "at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained."[3] *Parke v. Raley*, 506 U.S. 20, 30, 113 S. Ct. 517, 524, 121 L. Ed. 2d 391, 404 (1992). In this proceeding, Hartsfield is collaterally attacking the prior, out-of-state convictions, as he is seeking to "deprive them of their

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[3] In *Parke*, the defendant claimed two convictions offered against him for purposes of sentence enhancement were invalid because of his claim that his prior guilty pleas were not knowing and voluntary. 506 U.S. at 28, 113 S. Ct. at 523, 121 L. Ed. 2d at 403.

normal force and effect in a proceeding that had an independent purpose other than to overturn the judgments." *Id.* at 30, 113 S. Ct. at 523, 121 L. Ed. 2d at 404. The Supreme Court has observed that "[e]ven when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a burden of proof to the defendant." *Id.* at 31, 113 S. Ct. at 524, 121 L. Ed. 2d at 405.

Our supreme court has similarly stated, "It is the defendant's burden to prove he or she did not competently and intelligently waive the right to counsel when collaterally attacking a prior uncounseled conviction." *State v. Majeres*, 722 N.W.2d 179, 182 (Iowa 2006). It therefore follows that in his bare assertions, collaterally attacking his prior convictions, Hartsfield had the burden of going forward with evidence he was not provided counsel, or did not knowingly and intelligently waive counsel.

At the habitual offender trial, Hartsfield failed to assert and introduce evidence to show that he was not in fact represented by counsel on his previous convictions in Illinois. The burden therefore never shifted to the State to rebut any assertion of a legal infirmity of the prior convictions. Hartsfield's trial counsel did not have a duty to make a meritless objection and therefore, Hartsfield's ineffective-assistance-of-trial-counsel claim must fail. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) ("[C]ounsel has no duty to raise issues that have no merit."). Consequently, Hartsfield's argument his appellate counsel was ineffective for failing to pursue this argument must also fail. We affirm on this issue.

2. Felony Convictions.

Hartsfield also argues the State failed to prove any of his prior, out-of-state convictions were felonies, and therefore his trial counsel was ineffective for "represent[ing] to the trial court that the offenses qualified as felonies for purposes of the habitual offender statute." The State argues that because both prior convictions were felonies under applicable state law, Hartsfield's claim cannot prevail.

Iowa Code section 902.8 reads:

> An habitual offender is any person convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in any court of this state, or of the United States. An offense is a felony if, by the law under which a person is convicted, it is so classified at the time of the person's conviction.

"Generally, the State must prove the prior convictions . . . by introducing certified records of the convictions, along with evidence that the defendant is the same person named in the convictions." *Kukowski*, 704 N.W.2d at 691 (internal citation omitted). At the habitual offender trial, the State offered into evidence three certified records—two from Cook County, Illinois and one from Kent County, Michigan—of Hartsfield's prior convictions. Each of the records was notarized by a county circuit court judge, and the clerk of court. A fingerprint card was also submitted as proof of identity.

Hartsfield was convicted in Illinois of two separate robberies. He received a suspended sentence on the first charge of robbery, which carried a minimum term of six months, with a maximum term of thirty months. Upon conviction for the second robbery charge, Hartsfield received a five-year sentence, concurrent with the sentence imposed as a result of the revocation of probation for the first

conviction. Under Illinois law, a felony is defined as “an offense for which a sentence to death or a term of imprisonment in a penitentiary for one year or more is provided.” 730 Ill. Comp. Stat. Ann. 5/5-1-9 (West 2011). Because Hartsfield’s prison sentence for robbery in Illinois exceeded one year, the conviction is classified as a felony.

In Michigan, Hartsfield was sentenced on his conviction of breaking and entering to a minimum sentence of two and one-half years, and a maximum sentence of ten years. Under Michigan law, a felony is defined as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than [one] year or an offense expressly designated by law to be a felony.” Mich. Comp. Laws Ann. § 761.1(g) (West 2011). Hartsfield’s sentence of two and one-half years to ten years was therefore a qualifying felony under Iowa Code section 902.8.

Because Hartsfield’s prior convictions were felonies under the respective laws of Illinois and Michigan, Hartsfield cannot prove he suffered prejudice. *See Osborn*, 573 N.W.2d at 922 (“[T]he defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). Hartsfield’s claim his trial and appellate counsel were ineffective for not challenging the status of the convictions must fail and we affirm the district court’s denial of his postconviction application on this issue.

B. Prosecutorial Misconduct and Double Jeopardy.

Hartsfield maintains the mistrial that ended his first trial, was the result of prosecutorial misconduct.[4] At the postconviction trial, he alleged his trial counsel was ineffective for failing to move to dismiss the charges after the mistrial, as he claims double jeopardy then barred the continuation of his prosecution.

> A prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." The party claiming prejudice bears the burden of establishing it. It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather any resulting prejudice which prevents the trial from being a fair one. Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct. Appellate courts will overturn a trial court's ruling only upon finding an abuse of discretion.

State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989).

A mistrial resulted after testimony was heard regarding the amount of cash recovered from Hartsfield's shoe and testimony as to the chain of custody of the cash. On cross-examination of Corporal Jamie Brown by Hartsfield, Brown testified that he recovered $446 from Hartsfield's shoe. Hartsfield questioned the discrepancy between Brown's prior testimony—that $466 was recovered—not $446 as he then testified. Hartsfield also questioned the discrepancy between Brown's narrative report, which stated $466 was seized from Hartsfield, and the inventory report, which stated $446 was seized. As the chain of custody testimony continued, Lieutenant Scott Sievert was asked by the prosecutor about the procedures followed when money is recovered in a drug investigation. Sievert testified that "the money can be forfeited . . . if we can show that the

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[4] The February 2002 jury trial resulted in a mistrial; a second jury trial ended in a hung jury; the third trial was to the bench, with a subsequent habitual offender trial, also to the bench.

money is a result of—or proceeds from criminal activity." The prosecutor then asked, "And was the money forfeited in this case?" Sievert responded, "Yes."

In the motion for mistrial, Hartsfield's trial counsel argued the State's inquiry on the issue of forfeiture was highly prejudicial because it informed the jury the cash seized was, in another proceeding, determined to be "drug money." The county attorney responded by explaining:

> First of all, the context in which that issue came up was this: During [defense counsel] Mr. Treimer's cross-examination of Corporal Brown he introduced the inventory of seized property which showed the figure of $446 being seized from the Defendant. Also in the context of his cross-examination he brought up the issue of Corporal Brown having written it in his narrative report that he had seized $466 from the Defendant. The obvious inference there from that was that Corporal Brown was crooked and had pocketed some of the money, all right. So because of that that puts that issue out on the table because it's calling into question Corporal Brown's credibility.
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> . . . .
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> It was that cross-examination that opened the door to the explanation of where the money was at and the forfeiture that occurred.
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> . . . .
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> So because [Hartsfield] brought that up, he opens the door. He suggests again by asking Lieutenant Sievert was there a notice served, was the Defendant present to contest the hearing that again the State was engaging in some type of untoward behavior and attempting to do some injustice to Mr. Hartsfield. And the whole context of it revolves around that issue. And that's not an issue that we brought forward and put on the table first. It's how we responded to it to rehabilitate the credibility.
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> And so for those reasons, I don't think there was a mistrial and, quite honestly, I think that's why counsel didn't make a motion for mistrial, because he recognizes that.

The court responded to the prosecutor's argument stating, "This jury has been told that this drug money of $446 has been forfeited. Forfeited. That means to that jury it's been taken away from this Defendant because it's drug money." After considerable discussion, the prosecutor ultimately agreed the record would

be cleaner without the forfeiture testimony and the district court granted Hartsfield's request and declared a mistrial.

Where the defendant requests a mistrial, the Double Jeopardy Clause will generally not prohibit a retrial of the case. *State v. Swartz*, 541 N.W.2d 533, 537 (Iowa Ct. App. 1995). However, "[r]eprosecution is barred if the mistrial was caused by prosecutorial misconduct intended to goad the defendant into moving for a mistrial." *See id.* (citing *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2088, 72 L. Ed. 2d 416, 423 (1982)) (internal quotation marks omitted).

At postconviction, Hartsfield's trial counsel was specifically asked:

> Q: Did you believe that you had been goaded by the prosecutor to ask for a mistrial? A: Absolutely not. . . . There was no goading at all by the prosecutor on the first mistrial.

Hartsfield alleges the postconviction court was incorrect in determining that the record did not support a claim of prosecutorial misconduct, stating the prosecutor "intentionally goaded [his] attorney into requesting a mistrial" because the prosecutor knew she was losing.

In *Oregon v. Kennedy*, the United States Supreme Court held:

> [T]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679, 102 S. Ct. at 2091, 72 L. Ed. 2d at 427. Where a court finds the prosecutorial misconduct resulting in the termination of a trial was "not so intended by the prosecutor, that is the end of the matter for purposes of the Double Jeopardy Clause of the Fifth Amendment of the United States." *Id.* at

679, 102 S. Ct. at 2091, 72 L. Ed. 2d at 427. Our supreme court has further stated:

> Federal and state courts which have decided cases under the "intentional provoking of a mistrial" standard following the *Oregon v. Kennedy* opinion have agreed that the finding of subjective intent, which that standard calls into play, *must be made in the first instance by the trial court*.

State v. Rademacher, 433 N.W.2d 754, 757 (Iowa 1988) (emphasis added).

In this case, the district court during the first criminal trial did not make a finding regarding the prosecution's intent, nor did Hartsfield ask for such a finding. Therefore, on postconviction, Hartsfield bore the burden to show by a preponderance of the evidence that his counsel failed to perform an essential duty—in this case failing to secure a ruling by the district court regarding the prosecution's intent as it relates to mistrial—and that prejudice resulted. *See State v. Cromer*, 765 N.W.2d 1, 7 (Iowa 2009) (stating the "[d]efendant has the burden of proof to establish by a preponderance of the evidence that counsel rendered ineffective assistance").

As the State indicates in its brief, the only "evidence" Hartsfield presents is his assertion that the prosecution intentionally goaded his attorney into requesting a mistrial is because it was "losing." Although the trial court recognized the prejudicial nature of the forfeiture testimony, there was not substantial evidence that the prosecutor knowingly allowed the officer to testify falsely regarding the forfeited cash, thereby "goading" defense counsel in requesting a mistrial. The record clearly demonstrates the prosecutor was attempting to rehabilitate Brown's credibility after Hartsfield's questioning which implied that Brown had pocketed some of the cash. The attempt to tarnish

Brown's reputation—as one of the investigating officers—was not to be left unchallenged. The subsequent testimony regarding the chain of custody of the cash seized and the unfortunate wandering into the results of the forfeiture proceeding, was the basis for the mistrial. On postconviction, Hartsfield did not show by a preponderance of the evidence that the prosecution intended to provoke a mistrial. Therefore, any motion for dismissal on double jeopardy grounds would have been fruitless, and his counsel was not ineffective in failing to pursue a meritless claim.

C. Failure to Call a Witness.

Hartsfield next claims the district court erred when it concluded trial counsel was not ineffective in failing to call a witness who would provide exculpatory evidence. He contends that if Sandra Johnson had been called at trial, she would have testified that Hartsfield sold his mother's furniture to her, and therefore the cash found on his person was from the sale of furniture, not from the sale of drugs.

The record reflects that Johnson was twice subpoenaed before the second criminal trial and counsel attempted to locate her prior to the third trial to the bench. Hartsfield did not attempt to call her to testify at the postconviction trial, and the postconviction court did not find trial counsel ineffective "for failing to subpoena a witness he was unable to locate." As the State points out, "it is speculation as to what Johnson would have testified." Moreover, Hartsfield cannot show how the result of the criminal proceeding would have been different had Johnson testified, as "he still possessed seven rocks of crack cocaine and

admitted to law enforcement that he had obtained $446 from selling crack." We agree and affirm the postconviction court's denial of this claim.

IV. Unpreserved Claims.

In addition to the claims adjudicated above, Hartsfield raised several new claims in his pro se reply brief and supplemental pro se reply brief, including (1) the district court's failure to address all of applicant's pro se issues requires remand, (2) trial counsel was ineffective when he stipulated to the two prior felonies instead of making the State prove them, and (3) applicant's habitual offender sentence is illegal and therefore void. We decline to address these issues because Hartsfield raised them for the first time on appeal in his reply brief. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 770–71 (Iowa 2009).

V. Conclusion.

The district court in this case did not err in dismissing Hartsfield's application for postconviction relief where Hartsfield failed to prove his ineffective-assistance-of-counsel claims. Hartsfield's trial and appellate counsel were not ineffective for failing to challenge the habitual offender enhancement because Hartsfield's prior convictions were felony convictions. We find there was no proof that the mistrial resulted from prosecutorial misconduct, and any motion to dismiss based upon double jeopardy grounds would have been meritless. Consequently, Hartsfield's trial attorney was not ineffective. We have considered all of Hartsfield's other claims and find they are either without merit or not preserved.

AFFIRMED.