

IN THE COURT OF APPEALS OF IOWA

No. 2-094 / 11-0730
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE JAMES JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D. McKenrick, Judge.

A defendant claims he received ineffective assistance of counsel as a result of his attorney not arguing that the prosecutor committed misconduct by vouching for the credibility of the complaining witness during closing arguments.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross J. Barlow, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

A nine-year-old girl asserted that a man she viewed as her grandfather sexually abused her. The State charged Jesse James Jones with several crimes arising from the child's complaint. The district court granted a defense motion for judgment of acquittal on two of the charges but allowed the third to be submitted to the jury. The jury found Jones guilty of second-degree sexual abuse. See Iowa Code §§ 709.1(3), .3(2) (2009). The district court subsequently entered judgment and sentence.

On appeal, Jones contends the prosecutor committed misconduct by vouching for the credibility of the complaining witness during closing arguments. As his trial attorney did not object to the prosecutor's statements, Jones raises the issue under an ineffective-assistance-of-counsel rubric.

To prove ineffective assistance, Jones is required to show the breach of an essential duty and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). On the breach prong, the question is "whether a normally competent attorney would have concluded that the question . . . was not worth raising." *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003) (citation omitted). On the prejudice prong, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 882 (citation omitted). The ineffective-assistance-of-counsel claim fails if either prong is not satisfied. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

We begin with the breach prong. In evaluating this prong, we must decide whether the claimed underlying error has merit. *Graves*, 668 N.W.2d at 869. As noted, that claimed error is prosecutorial misconduct, which requires proof of misconduct that deprived the defendant of a fair trial. *Id.*

On the question of misconduct, it is established that a prosecutor “is precluded from using argument to vouch personally as to a defendant’s guilt or a witness’s credibility.” *Id.* at 874 (quoting *State v. Williams*, 334 N.W.2d 742, 744 (Iowa 1983)). A prosecutor also is not allowed to make statements that “distort the burden of proof.” *Id.* at 880. Jones asserts that the prosecutor did both. He cites the following portions of the prosecutor’s closing argument:

Mr. Jones, I’m sure, through the cross-examination argued that well, [A.E.] is making this up. She’s in trouble, so she’s just doing this to get her grandfather in trouble. You can only use your common sense and experience to decide when children lie, when children don’t lie. Was [A.E.] telling you the truth here yesterday? Which certainly a difference between a small lie children normally tell versus a lie in which the police are called, they’re taken to the hospital, they come and testify in court, either at depositions or a trial. *And [A.E.] did not tell a lie in this case.* This is—this is simply not a situation where she was trying to—she was mad or trying to get what she wanted. There was no incentive for her to go to the hospital or talk to the police department or come into court and have to sit in this chair and talk to you, age nine, about sexual matters. There’s no incentive or motive for her to do that at all. *And she told the truth about what happened to her. That’s one way the State has proven its case beyond a reasonable doubt.*

There is a second way the state has also proven this case, and that is through the testimony of the people who saw her right after this event happened. [A.E.] is not an Academy Award-winning actress. She was being honest with you about what her perceptions were and what happened to her. You heard the testimony of her sister [], you heard the testimony of her sister’s friend, and of her—young woman [] who also—all three of them came home and found [A.E.] under the bed crying. You heard the testimony of [A.E.’s] mother who got the frantic call from [A.E.] saying she’s frantic and excited, she couldn’t tell what she was saying, something about grandpa. You heard the testimony of the

nurse who saw her in the hospital. You heard the testimony of her father who said that she was upset and shaken. You heard the testimony of the police officer that, yeah, she had finally calmed down. By the time he arrived her mother was there in the ER. A child who simply made something up is not found hiding underneath the bed, call mom all frantic, and is now observed by three people underneath the bed crying, is not visibly shaking, continues that way as they're taking her to the hospital, continues to act that way in front of ER nurse and doctor, continues to tell the ER doctors what happened to them, that evidence in itself shows you how Miss [A.E.] had this happen to her, how it traumatized her and helps her determine that's corroborating evidence. *She's telling you the truth.*

(Emphasis added.) Jones also cites the following portion of the prosecutor's rebuttal statement:

Again, we have defense strategy of saying well, she said she was penetrated. That's inconsistent with the no injuries, so it didn't happen. That doesn't mean it didn't happen. *We know it happens, because [A.E.] told you it happened, she has no reason not to tell you the truth.*

(Emphasis added.)

The prosecutor's statements were inartful and treaded close to the impermissible line delineated in *Graves*. However, they did not cross that line. The prosecutor's statements were made in the context of his summary of the evidence. *Id.* at 875 (“[T]he prosecutor's comments on the defendant's lies or lying were legitimate inferences from the evidence.”). Notably, that evidence included the defense attorney's cross-examination concerning the child's propensity to lie. Jones's attorney even raised this issue in his closing argument, stating, “[H]er mother says she lies when she's in trouble,” and, “[H]er sister says she makes stuff up to get attention.” While this statement was made after the prosecutor vouched for the child's credibility, it highlights the defense theory throughout trial of portraying the child as a compulsive liar. Given this evidentiary

record, we conclude the prosecutor did not commit misconduct and, therefore, defense counsel did not breach an essential duty in failing to assert a claim of prosecutorial misconduct based on the challenged statements.

While our opinion could end here, we elect to briefly address the question of *Strickland* prejudice. The evidence supporting a finding of guilt was not limited to the child's testimony. The child's mother, step-father, and sister also testified about virtually contemporaneous events. For instance, A.E.'s mother stated that she received a hysterical call from her daughter, who said her grandpa raped her. When the child's step-father was informed of the call, he immediately went home to check on her, and A.E. told him the same thing. A.E.'s sister also recounted this statement, as did her friend.

The State additionally called a criminalist, who compared the DNA profile from sperm found on the child's underwear with the DNA profile from a saliva sample provided by Jones. The criminalist testified that "the spermatozoa identified on the underwear and the DNA profile obtained from the sperm fraction matched Mr. Jesse James Jones. And fewer than one out of one hundred billion individuals would be expected to have that same profile."¹

We conclude that there is no reasonable probability the result of the trial would have been different had defense counsel objected to the prosecutor's

¹ While the defense attorney suggested in his closing argument that the criminalist's opinion was difficult to comprehend, he did not attack the basis for the opinion. See, e.g., Joel D. Lieberman et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 *Psychol. Pub. Pol'y & L.* 27, 31–32 (2008) (setting forth limitations of DNA evidence and bases for challenging it).

statements during closing arguments. Accordingly, we affirm Jones's judgment and sentence for second-degree sexual abuse.

AFFIRMED.

Tabor, J., concurs; Mullins, J., specially concurs.

MULLINS, J. (concurring specially)

I respectfully concur specially.

The prosecutor crossed the line when he said “[a]nd [A.E.] did not tell a lie in this case,” “[a]nd she told the truth about what happened to her,” “[s]he’s telling you the truth,” and “[w]e know it happens, because [A.E.] told you it happened, she has no reason not to tell you the truth.”

Those were his opinions, his vouching for the witness, and they were improper. Those statements are distinguishable from defense counsel’s remarks that were reporting on evidentiary statements made concerning the witness’s credibility. Pursuant to *Graves*, 668 N.W.2d at 874, the prosecutor committed misconduct. I reluctantly agree, however, that the case should be affirmed under the *Strickland* prejudice standard.