IN THE COURT OF APPEALS OF IOWA

No. 2-260 / 11-0883
Filed June 13, 2012

PETER CHRISTIAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Sean W. McPartland, Judge.

Peter Christian appeals the postconviction court's dismissal of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Peter Christian, Des Moines, pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Janet M. Lyness, County Attorney, and Andrew V. Chappell, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vogel and Doyle, JJ. Tabor, J., takes no part.

EISENHAUER, C.J.

Peter Christian[1] appeals the dismissal of his application for postconviction relief. Christian argues his trial attorneys were ineffective in failing to object to hearsay evidence and the prosecutor's closing argument. Additionally, Christian asserts his postconviction trial counsel was ineffective.[2] We affirm.

I. Background Facts and Proceedings.

In May 2003, Christian was charged with burglary and third-degree sexual abuse based on allegations he entered Emily's Iowa City apartment without her consent on October 26, 2002, and engaged in a nonconsensual sex act with her.[3]

During the 2004 jury trial, Emily testified she went out drinking with her roommates, Shannon and Sarah, at 11:00 p.m. Around 2:30 a.m., Emily decided to leave a party before Shannon and Sarah left, and she recalled flagging down a taxicab to take her home. Shannon and Sarah knew Emily was leaving.

When Emily returned home, she left the door to the apartment unlocked. Emily spoke briefly with a friend who called her cell phone. She then reclined on a small couch/loveseat to watch T.V. The next thing Emily remembered was being awakened by her roommates who were screaming, "Who was that guy?!"

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[1] Peter Christian is also known as Peter Christian Glass.

[2] We have considered all arguments raised by Christian, and those not specifically addressed are deemed to be without merit.

[3] The trial information's one additional count of sexual abuse (different victim/different date) was severed and tried separately. Christian was represented by the same attorneys and, in December 2003, was acquitted.

Emily testified she remembered everything "up until the time I fell asleep on the couch." She denied consent to sexual contact with anyone or even knowing anyone was having sexual contact with her.

According to Shannon and Sarah, they returned to their apartment at approximately 3:30 a.m. After unlocking the door and entering, they saw an unidentified man jump up off of the couch and pull his pants up. Believing they had encountered an embarrassing situation, they left the room.

After conferring, Shannon and Sarah concluded something was wrong. They returned to confront the man and found him on the couch with his eyes closed. Shannon testified:

> The way that he was positioned . . . it was very unnatural. If they had fallen asleep together at some point, it would not have been in that position. Plus, he had been up, standing up, jumping up pulling his pants up probably not even a minute or two later. So there was—we knew he wasn't asleep, and so we started asking him questions, what he was doing there, why he was there. And he immediately—he got up and he started mumbling something about how he was helping Emily and she had fallen at some point and that he was just there to help.
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> . . . .
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> Q. He didn't run. A. No.
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> Q. He didn't hide. He appeared calm. A. He wasn't calm. He was stuttering. He was saying the same thing over and over.

Roommate Sarah testified:

> Q. When you say he appeared to be sleeping, what do you mean? A. Well, he had lay back down sort of—the couch is small enough where there's barely enough room for one person . . . . [H]e had just jumped up literally less than a minute later and all of a sudden was eyes closed and was sleeping soundly.
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> . . . .
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> Q. Did he say anything when you asked him questions? A. He was stumbling and stuttering and . . . what I made out was, "I was helping her." She was fine but he was—
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> Q. Did he ever mention Emily's name? A. No, he didn't say her name ever.

> Q. After he said she had fallen, what did you do? A. I said, "She's fine. She's fine. Just leave. Get out of here." And he was walking and I think I may have pulled his shirt to lead him towards the door. He was walking towards the door. And at that point he was mumbling, "She had fallen. She had fell and I was helping her."

While trying to awaken Emily, Shannon and Sarah observed Emily's pants were undone and pulled down. They took Emily to the hospital to determine if she had been sexually assaulted. Emily was examined by an emergency room physician who collected specimens for a sexual assault kit. The examination did not disclose the presence of any sperm in Emily's vagina or cervix. The doctor was also unable to conclusively determine whether Emily's vagina had been penetrated.

Iowa City police investigators subsequently sent Emily's sexual assault kit to the Iowa Department of Criminal Investigation (DCI) laboratory for DNA analysis. The DCI criminalist found a seminal stain on the inner crotch of Emily's underwear.

Iowa City police considered Christian to be a suspect. The Iowa City Rape Victim Advocacy Program (RVAP) informed police officer Jennifer Clarahan it was interviewing Christian for a volunteer position on April 23, 2003. When Christian's RVAP interview was over, Officer Clarahan collected the water bottle and fork he had used and sent them to the DCI lab for analysis. The test results showed the DNA on the water bottle and fork matched the DNA samples obtained from Emily's underwear. A subsequent search warrant application requested authority to detain Christian for collection of cheek swabs for additional

DNA testing. These DNA tests confirmed the DNA samples already obtained from Christian matched those found in Emily's underwear.

Christian, age mid-thirties, testified to a different version of the evening's events. According to Christian, he and his friend Lance were walking on the sidewalk when he saw Emily, a woman he did not know, come out of her apartment building and cross the sidewalk in front of them. Christian did not see any cabs in the area. He observed Emily stumble on the curb as she turned around. Christian reached out his hand and said, "Are you okay," and helped her up. Christian and Lance talked with Emily, and she invited them up to her apartment where they watched T.V. and talked.

After Christian and Emily started to kiss, Lance wanted to go and left Emily's apartment. Emily and Christian "continued to kiss and cuddle, it started to get to the stage of taking off clothes. I think she unzipped my pants, and I ejaculated." Christian acknowledged Emily's pants were down, stated Emily did not appear to have been intoxicated, asserted the activities were consensual, and denied sexual intercourse or a sex act. Christian testified he continued to cuddle with Emily and they fell asleep on the couch. Christian claimed he asked Emily's roommates to wake her up so Emily could explain "and they just grabbed my shirt and pushed me out the door."

Lance did not testify at trial. Dr. Perry, a psychopharmacology expert, explained a "black out" [alcohol induced amnesia] condition to the jury. During a "black out" the person is conscious.

> [T]he black outs come in two varieties. One is called a fragmentary blackout where a person can remember maybe 30, 40, 50 percent of what went on during the drinking episode, to a total blackout . . .

> which they can't remember anything. So they're just 100 percent anesthetic from some point in their drinking episode until whenever they usually woke up.

During the unrecorded closing arguments, defense counsel argued Christian would not have stayed in the apartment and remained on the couch if he had sexually abused Emily. Additionally, defense counsel asserted even though Emily was in a "black out" she was capable of consenting.

The jury convicted Christian of third-degree sexual abuse and acquitted him of first-degree burglary. Christian appealed, and we affirmed his conviction. *State v. Christian*, No. 04-0900, 2006 WL 2419031 (Iowa Ct. App. Aug. 23, 2006).

In 2007, Christian filed a pro se application for postconviction relief. With the assistance of counsel, Christian filed an amended application asserting twenty-three specific instances in which trial co-counsel (Mr. Klausner and Mr. Persaud) failed to perform effectively. Christian also filed a pro se supplemental amendment to counsel's amended application. Due to Christian's numerous changes in postconviction counsel and numerous requests for continuances, his applications were heard on October 11-12, 2010.

In May 2011, the postconviction court denied relief in a detailed and comprehensive opinion. The court noted Christian had served his sentence and is no longer on parole, but is seeking to remove his name from the sex offender registry. The court found:

> Mr. Persaud testified at the time of the postconviction trial as to the change in [Christian's] position with respect to an alibi witness over the course of time [his mother, a Vietnamese woman from Ames, Lance] . . . .

> Finally, the Court saw and heard [Christian's] recollection of the events at trial . . . . At the postconviction trial, [Christian's] testimony was self-serving and often at variance with that of his trial counsel. As explained by trial counsel, in his conversations and correspondence with them, [Christian] had trouble keeping his story straight—who he was with, how he met the victim, etc.—basic things one would expect a defendant to remember when he is being accused of sexual assault and burglary. Of significance to the Court, [Christian's] versions of events apparently changed during the criminal trial. In short, [Christian] appeared to be intelligent and savvy, but his demeanor and the inconsistencies in his testimony over time undercut his credibility.

Christian now appeals the denial of postconviction relief.

II. Scope of Review.

"Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution." *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). We review ineffective-assistance-of-counsel claims de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005). "[W]e give weight to the lower court's findings concerning witness credibility." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Hearsay Objection—Taxi Driver.

Christian argues his trial attorneys were ineffective for failing to object to Officer Clarahan's improper hearsay evidence regarding the existence of a female cab driver. Christian contends he was prejudiced because the hearsay testimony "served to bolster [Emily's] testimony" and "[w]ithout this evidence, the jury would have been left to juggle [Emily's] lack of memory and [Christian's] plausible explanation for both his presence in the apartment and the presence of his semen on [Emily's] underwear."

At trial, Emily testified she walked a few blocks with friends after leaving the party and then she hailed a cab. When asked if she remembered the cab company, Emily stated: "I don't, since we just flagged it down. I know the driver was female."

Officer Clarahan testified about her investigation of the cab companies:

> A. I attempted to locate the cab which [Emily] had taken that evening, so I called the cab companies.
> . . . .
> A. At a later time I interviewed Leslie Stevens . . . .
> Q. Had she actually been working that night? A. Yes, she had.
> Q. Did she remember anything specifically about that night? A. No, she didn't.
> . . . .
> Q. Were there any trip sheets remaining for that date at that time? A. No. I checked with the company and they had been destroyed.

To establish his ineffective-assistance-of-counsel claim, Christian must prove by a preponderance of the evidence his trial attorneys failed to perform an essential duty and this failure resulted in prejudice. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). "However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney[s] performed deficiently." *Ledezma*, 626 N.W.2d at 142.

We begin by addressing the prejudice element. Christian must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). We look to the totality of the evidence, the factual findings that would have been affected by counsel's errors,

and whether the effect was pervasive, minimal, or isolated. *Id.* at 695-96. The governing question is "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Attorney Klausner testified the State learned of cabdriver Stevens from the defense. Klausner knew "Stevens had no memory of picking up this young woman as a fare or having a fare and that there were no trip tickets for it." Klausner did not believe the existence of a female cab driver was critical to the theory of the defense: "[I]n terms of when [Emily] went into a blackout, you don't have to push all the way back to the party."

Klausner explained the defense was "walking a tight rope between how intoxicated [Emily] is because . . . you want the middle ground." The defense wanted to offer sufficient evidence of Emily's intoxication "to explain her convenient lack of memory as to consenting where she was in a blackout, but you don't want her so drunk that she's passed out." Attorney Klausner believed the defense was able to adequately argue a blackout occurred in the closing arguments.

Attorney Persaud agreed the blackout defense "was a fine line that we had to walk between saying there's a blackout and whether someone's incapacitated." Persaud conducted the cross-examination of officer Clarahan and considered the ride with a female cab driver to be "a non-issue." Emily "saying she took a cab home and there's no proof of her taking a cab home, to me, suggested she was wrong in that memory . . . because there was absolutely

no proof of her taking a cab home. And this also played into [Christian's] testimony." Persaud explained:

> Q. Did you have any tactical reason for not [objecting]? A. Well . . . one, [it wasn't] anything that I thought was really pertinent to the trial, really impacting the trial. I don't think it had any impact on the jury, even now when I look at it. Two, the State didn't prove that she took a cab home. And this was key to how [Christian] eventually testified, because [he] in some notes told us—because he had looked at everything ahead of time and saw [Emily's] testimony, and said that he met her outside after she came out of a cab and probably was going to testify to that extent. But after the State couldn't prove that there was a cab ride home, his testimony was she came out of the apartment. So, to me, whether she got a ride there or not wasn't a big deal. In fact her testimony—testifying that she took a ride home and they couldn't prove it, to me, showed that she couldn't remember things correctly, and it was probably a different day.
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> . . . .
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> Q. I think you testified that Mr. Christian at some point told you he was going to testify that he saw . . . [Emily] get out of the cab? A. Yeah . . . . [W]e did not work on [Christian's] testimony until the day before. And so the whole trial, all the facts were in, and prior to that time [Christian] had [written] letters or notes about what happened that night . . . . And prior to trial, he would talk about her stumbling out of a cab, but since there was no testimony to that effect at trial, his testimony became that he encountered her as she walked out of the apartment building and then she stumbled.

The postconviction court specifically found the testimony of attorneys Klausner and Persaud to be credible. The court also ruled:

> [Christian] had told inconsistent stories about the cab, leading reasonably to the defense at the time of the criminal trial not focusing substantial attention on the testimony related to the cab. Indeed, based on [Christian] having maintained before the criminal trial that he had seen the victim "stumbling out of a cab," there was little reason for trial counsel to contest evidence [Emily] had taken a cab. There was no way for trial counsel to know that, after the conclusion of the State's evidence, [Christian] would change his story to be that he "encountered her as she walked out of the apartment building and then stumbled" rather than testifying he first saw her "stumbling out of a cab."
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> . . . .

> [Christian] has not shown he was prejudiced by such evidence. Mr. Klausner's testimony establishes that trial counsel did not believe they needed to argue that the claimed blackout was happening even before the victim left the party she was attending, and that trial counsel did not find it necessary to argue that the blackout was in effect during [Emily's] time in a cab. Again, the court concludes this was a reasonable strategic decision by trial counsel.

After our de novo review of the record, we agree with and adopt the postconviction court's analysis and conclude there is not a reasonable probability the result of the trial would have been different had Christian's trial attorneys objected to Officer Clarahan's testimony.

IV. Prosecutorial Misconduct Objection.

Christian asserts his trial attorneys were ineffective in failing to object and argue prosecutorial misconduct based on the prosecutor's closing rebuttal argument referring to him as a "fox in the hen house." Christian argues this statement is improper because it "implies a danger to innocent victims, not a single victim, but a number of victims. The reference implied [Christian] either had or would in the future pose a danger to more victims. Perhaps it was an allusion to the potential rape of [Emily's] roommates."

The State argues the prosecutor's analogy of a "fox in the hen house" was made as a direct response to the closing argument constructed by the defense and is not an improper statement. At the postconviction hearing, the prosecutor explained:

> It was on rebuttal . . . . They were talking about Mr. Christian being in the apartment, and if he had been actually there to sexually assault . . . he would have immediately ran out when [Emily's] roommates came home. And I basically was . . . answering that by trying to explain . . . he was in control, he was like the fox in the henhouse . . . . [Emily] had been drinking. She

> was sleeping and, by all accounts, basically passed out or not responsive when the roommates walked in and thereafter and also that the roommates had been drinking.
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> . . . .
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> Well . . . I was trying to explain . . . [Christian] was the person that knew what was going on, and that he was in control at that moment when they walked in, and that he didn't necessarily—would have run out.

The postconviction court found: "There is insufficient credible evidence to establish prosecutorial misconduct . . . . The [prosecutor's] statements . . . appear to have been made in the context of the facts as presented at trial." Further: "[T]he contentions related to the prosecutor's closing argument were raised and rejected by Judge Remley at the time of the sentencing hearing, shortly after trial. Judge Remley specifically determined [Christian] had suffered from no prejudicial misconduct."

We resolve this issue under the "essential duty" element of Christian's ineffective-assistance-of-counsel claim. Under this element, Christian must show his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons,* 714 N.W.2d 264, 276 (Iowa 2006). We presume the attorney performed competently and avoid second-guessing and hindsight. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

A meritorious prosecutorial misconduct claim requires proof of two elements: (1) misconduct and (2) "the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). We view the statements of the prosecutor in the context of the entire trial. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). We recognize a prosecutor has "some latitude during closing argument in

analyzing the evidence submitted in the trial." *Graves*, 668 N.W.2d at 874. "Moreover, a prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence." *Id.*

After our de novo review, we find no misconduct—the first element for a meritorious claim of prosecutorial misconduct. The prosecutor's statement was made in the context of references to both the evidence and the "failure to run" argument advanced by the defense. Accordingly, Christian's postconviction claim fails because his trial counsel did not breach a duty in failing to make a meritless objection to the statement. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) (holding "counsel has no duty to raise an issue that has no merit").

V. Ineffective Assistance—Postconviction Trial Counsel.

Christian argues his postconviction trial counsel was ineffective in failing to argue criminal trial counsel's ineffectiveness in not objecting to the admission of State's exhibit 9 (one page of Emily's cell phone bill[4]) and any related testimony. Christian's claim against postconviction trial counsel appears for the first time in this postconviction appeal.

First, the State requests we reverse *Dunbar v. State*, 515 N.W.2d 12 (1994). *Dunbar* allows a postconviction applicant to first raise a claim his postconviction trial attorney was ineffective *on appeal* from the denial of the postconviction action. 515 N.W.2d at 15-16. Although the State makes some persuasive arguments supporting this assertion, we decline the State's invitation to reverse *Dunbar*. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957); *State*

[4] The bill is for the cell phone number/cell phone Emily was using, and the phone is listed to Emily's mother.

v. Hastings, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). Because the record is adequate to dispose of this claim, we address it now. *See Dunbar*, 515 N.W.2d at 15. We apply the same standards in our evaluation of the competency of postconviction trial counsel. *See Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985) (noting same standards for competency apply to trial counsel and any subsequent counsel).

At trial, Emily testified she remembered going inside her apartment, getting a drink of water, "maybe" going to the bathroom, and then turning on the TV and talking to a friend on the phone (incoming phone call). Emily identified exhibit 9 as the phone bill for her cell phone number and stated the incoming call from her friend occurred at 2:38 a.m.

Attorney Klausner cross-examined Emily and challenged her memory of the evening's events based on inconsistencies in her story about the incoming phone call:

> Q. . . . [Y]ou told [detective Glass] essentially what you told me today except you told him that once home, you sat down on the couch to watch TV and you don't have any memory of anything else; correct? A. After that point, yes.
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> Q. You didn't mention a phone call. A. That happened before sitting on the couch to watch TV.
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> Q. You never mentioned the phone call to Officer Glass? A. I guess not.
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> Q. You never mentioned a phone call to anyone until after you got that phone bill; isn't that correct? A. No. I mean I knew before the phone bill because just by looking at your—I remembered and then we also we were looking the next day to see what time we had gone to the hospital, and then I noticed the incoming call again.

On our review we find Christian cannot show he was prejudiced by postconviction counsel's failure to assert his trial counsel was ineffective in not

objecting to the cell phone bill exhibit. Attorney Klaussner's cross-examination reveals a trial strategy of using this exhibit to impeach Emily and illustrate her inconsistent stories of the evening's events. This exhibit allowed defense counsel to further advance Christian's "black out" defense of Emily's failed memory after an evening of drinking. We cannot find that had postconviction trial counsel made this ineffective-assistance argument, the postconviction court would have found criminal trial counsel ineffective. Because Christian cannot show prejudice, this alleged error by postconviction counsel affords no basis for an ineffective-assistance-of-counsel claim.

AFFIRMED.