

**IN THE COURT OF APPEALS OF IOWA**

No. 3-855 / 12-0927  
Filed December 5, 2013

**JOSEPH JOHNSON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,  
Judge.

Applicant appeals from a ruling denying his request for postconviction  
relief. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant  
Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith,  
Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**GOODHUE, S.J.**

The applicant, Joseph Leo Johnson, appeals from a ruling entered May 8, 2012, denying his request for postconviction relief. Johnson contends that he received ineffective assistance of counsel in three particular areas: (1) failing to object to prosecutorial misconduct, (2) withdrawing the applicant's notice of self defense and failing to present evidence or prepare the applicant for testimony relative to the issue of self-defense, and (3) failing to pursue the applicant's request for judgment of acquittal with adequate specificity. In his pro se brief, Johnson also raises the issue of trial counsel's failure to object to a misstatement of the law in the instructions and generally contends that the trial court in the postconviction proceeding applied a lesser standard to his counsel's performance than is permitted by applicable law.<sup>1</sup>

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Johnson was convicted of first-degree murder and was sentenced to life in prison on November 29, 2007. He appealed his conviction, and his conviction was affirmed by this court. See *State v. Johnson*, No. 07-2074, 2010 WL 200048 (Iowa Ct. App. Jan. 22, 2010). The factual background is set out in that opinion. See *id.* The claims of ineffective assistance of counsel as to the failure to request a corroborating instruction to the admissions and the failure to present a self-defense claim were preserved for postconviction relief in that decision. See

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<sup>1</sup> The applicant, in his petition for postconviction relief, also alleged ineffective assistance of counsel based on counsel's failure to request a corroborating instruction to support the applicant's admissions to the extent that they constituted a confession. This issue was not briefed and is deemed waived. See Iowa. R. App. P. 6.903(2)(g)(3).

*id.* The factual setting for Johnson's conviction will not be repeated except to the extent that it may be relevant to this proceeding.

The victim died of a stab wound. The stabbing took place at a party where at least twenty-five to thirty people were present. A fight broke out. Witnesses testified that the victim and Johnson were involved in the fight and there was testimony that they were directly fighting with each other immediately prior to the discovery of the victim's fatal wound. No one saw Johnson inflict the fatal wound. However, witnesses—including a law enforcement officer—testified that Johnson stated he had killed someone or made other statements from which one could infer that he was admitting he was the one who stabbed the victim. Generally each admission was coupled with an explanation suggestive of justification. Other witnesses testified that Johnson had a knife during the altercation and had blood on his clothes after the altercation.

Counsel at the trial court level filed a notice of self-defense, but the notice was withdrawn before trial. Johnson testified at trial he did not stab or kill the victim. His testimony suggests that someone else at the party must have done it. At the postconviction relief hearing, Johnson's trial counsel testified Johnson always insisted at trial and prior to trial he simply did not stab the victim; therefore, the self-defense claim was abandoned. No specific instruction or evidence was submitted relative to the self-defense issue.

On voir dire, the prosecutor discussed the difference between a murder charged based on the felony murder rule and premeditated murder. She then stated, "The case that we're going to present . . . is going to be under the category of premeditated." After making the statement, she began asking the

jury what “premeditated” meant to them. Johnson’s counsel did not object and Johnson now contends the prosecutor was inappropriately instructing the jury in voir dire. The prosecutor then asked a juror: “If you do something when you’re angry are you still responsible for your actions?” Johnson contends this was an impermissible argument in voir dire, and again trial counsel did not object.

In her opening statement, the prosecutor stated she would prove that after the initial confrontation at the party, the applicant left, but came back. She then asked two questions that might be classified as rhetorical questions. The prosecutor specifically stated:

One would have to ask, why are you going back to the party to begin with, a party that you been asked to leave, a party that was obviously uncomfortable at best for some of the individuals in that car because of the racial slur? Why do you go back? Why do you go back with knives?

Later, in referring to the bloody clothes Johnson was observed wearing but were never found, the prosecutor asked: “Where are they? Why did he get rid of them?” Johnson’s trial counsel did not object and Johnson submits that the prosecutor was impermissibly arguing her case in opening statement.

On direct appeal, this court stated Johnson’s counsel made only a general and not a specific motion relative to the judgment of acquittal on other issues not relevant to this proceeding. Johnson now asserts trial counsel’s failure specifically to alert the court at that stage of the trial to the lack of evidence that he actually inflicted the fatal stab wound constitutes ineffective assistance of counsel. He asserts that if the trial court had been alerted to the omission in the State’s case, the motion would have been granted.

Finally, Johnson asserts the postconviction trial court erred in determining whether prejudice resulted from counsel's alleged ineffective assistance in mistakenly applying a standard requiring a reasonable probability the outcome would have been different if Johnson had received effective assistance. More specifically, Johnson, in his pro se brief to this court, contends the trial court applied the rule requiring prejudice in a mechanical nature without considering the overall fairness of the proceeding. Finally Johnson objects to the court's instruction to the jury that if the wound inflicted by the defendant "caused or directly contributed" to the victim's death, the defendant could be found guilty. Johnson in his pro se brief seems to assert that the court should have instructed the jury the stabbing would need to be the sole proximate cause of the victim's death for him to be found guilty.

## **II. ERROR PRESERVATION.**

The State did not contest any error preservation issues that might exist. This includes errors made by trial counsel, appellate counsel, and postconviction relief counsel.

## **III. SCOPE OF REVIEW.**

The scope of review of a claim of ineffective assistance of counsel is de novo. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009).

## **IV. DISCUSSION.**

To prevail on an ineffective-assistance-of-counsel claim, the claimant must establish by a preponderance of the evidence both that counsel failed to perform an essential duty and prejudice resulted. *State v. Clay*, 824 N.W.2d 488, 495-96 (Iowa 2012). There is a presumption counsel performed his duty competently

and ineffective assistance of counsel is not determined by hindsight. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Counsel is not ineffective for failing to raise an issue that has no merit. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010).

**A. Prosecutorial Misconduct.**

To establish prosecutorial misconduct, Johnson must prove misconduct and that prejudice resulted therefrom. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). In determining prejudice, the content of the whole trial is considered with (1) the severity and pervasiveness of the misconduct, (2) the significance of the misconduct as it relates to the central issues of the trial, (3) the strength of the State's case, and (4) the use of cautionary instructions. *Id.*

The voir dire questions related to factors and issues upon which a jury would have to decide. Wide latitude is granted in voir dire examination. *State v. Hunt*, 801 N.W.2d 366, 372 (Iowa Ct. App. 2011). The potential jurors' answers to the above questions would indicate their attitudes, important in the exercise of a challenge. No prosecutorial misconduct took place in the voir dire; therefore, Johnson's trial counsel had no duty to object, nor did appellate counsel or postconviction counsel have any obligation to raise the issue.

In the prosecutor's opening statement, she set out what the State's evidence would show and left the conclusions of the evidence up to the mind of the jury. It is appropriate for the prosecutor to set out in the opening statement what he or she believes the State's case will show. The prosecutor did not set out the conclusions she thought the jury should reach, even though conclusions are an acceptable content of opening statements. See *State v. Kindall*, 203 N.W.

806, 807 (Iowa 1925). The prosecutor's opening statement did not constitute prosecutorial misconduct. Therefore trial counsel had no duty to object, nor did appellate counsel or postconviction trial counsel have any obligation to raise the issue.

**B. Failure to Pursue Self-Defense Issue.**

The record substantiates the postconviction trial court's ruling on the issue, which will be restated. The court, after noting that the defendant testified under oath that he did not stab the victim, stated:

Trial counsel was faced with two irreconcilable theories. Either the applicant did not stab and kill the victim as he contended until he was convicted, and the admissions that he made to various witnesses and other individuals were untrue or, in the alternative, he did stab and kill the victim while acting in self-defense.

Johnson's trial counsel in the underlying case testified in the postconviction relief proceeding that Johnson repeatedly denied that he stabbed the victim and continued to deny that he did so in his trial testimony. Counsel testified Johnson never said anything to the contrary, either directly to trial counsel or in open court.

Pursuing a general denial and abandoning the issue of self-defense was a tactical decision of trial counsel and in conformity with the Johnson's own statement to counsel. Trial counsel was left with little choice. Even if trial counsel's strategy was improvident or miscalculated, it would not necessarily constitute ineffective assistance of counsel. See *LeMaster v. State*, 821 N.W.2d 856, 866 (Iowa 2012). Trial counsel did not pursue the self-defense issue and the record did not require any instruction regarding self-defense be given. Johnson did not receive ineffective assistance of counsel on the self-defense

issue as to pursuing it, preparing the applicant to testify, or failing to request an instruction on the issue.

**C. Lack of Specific Motion for Acquittal as to Causation.**

The motion for judgment of acquittal was general, as is set out in *State v. Johnson*, 2010 WL 200048, at\*1. If it had been specific as to the issue of having stabbed the victim, it still would have been overruled. For a judgment of acquittal to have been granted, the court would have had to find that the evidence was deficient to the point that a rational jury could not find the defendant guilty beyond a reasonable doubt when reviewing the evidence in the light most favorable to the State. *State v. Dominques*, 482 N.W.2d 390, 392 (Iowa 1992). The postconviction trial court stated:

The corroborating evidence includes the applicant's own admissions as well as the evidence he was engaged in a physical battle with the victim immediately before the victim was stabbed, that he had a knife in his possession at the time of the stabbing, and had blood on his clothes immediately after the stabbing."

Based on the record, the postconviction trial court's statement is correct. A motion for acquittal based on insufficient evidence would have been meritless. Trial counsel's failure to specify causation of the victim's death in the motion for acquittal does not constitute ineffective assistance of counsel.

**D. Incorrect Statement of Law and Instruction No. 16.**

Johnson, in his pro se brief, argues that Instruction No. 16 is not a correct statement of the law because it instructs the jury that "the wound inflicted by the defendant resulted in the death of Trey E. Blythe if it caused or directly contributed to Trey Blythe's death." Johnson's objection is to the words "or directly contributed." Trial counsel did not object to the instruction, but if an



objection had been made, it would have been overruled. There is a sufficient causal relationship between the defendant's act and the prohibited consequences if the actor's conduct is a substantial factor in bringing about the harm. *State v. Wissing*, 528 N.W.2d 561, 564-65 (Iowa 1995). The only exception would be if an intervening cause was the sole proximate cause of the harm. *Id.* at 565. There is no evidence of such an intervening factor in this case. Failure to object to Instruction No. 16 does not constitute ineffective assistance of counsel.

**E. Trial Court's Use of Inappropriate Standard to Determine Ineffective Assistance of Counsel.**

Johnson asserts in his pro se brief that the postconviction trial court applied mechanical rules, rather than viewing the overall fairness of the underlying trial as required by the case of *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984). The *Strickland* court suggests that overall fairness of a trial or lack of prejudice when the trial is viewed as a whole can overcome what constitutes minor specific findings of ineffective assistance of counsel in its suggestion that overall fairness is the ultimate issue. *Strickland*, 466 U.S. at 695-96. In this case the court has found no specified deficiency in trial counsel's defense of Johnson and further finds the record shows Johnson received a fair trial within the meaning of the law. The postconviction trial court did not apply an incorrect standard in determining whether Johnson had received ineffective assistance of counsel. The record does not establish that Johnson received ineffective assistance of counsel as to any issue raised.

**AFFIRMED.**