

IN THE COURT OF APPEALS OF IOWA

No. 3-934 / 12-1942
Filed October 23, 2013

ELVIS MUSEDINOVIC,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

A postconviction relief applicant contends he received ineffective assistance of counsel when his criminal trial counsel failed to object during the State's closing argument. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

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

VAITHESWARAN, P.J.

Elvis Musedinovic appeals the denial of his postconviction relief application. He contends his “criminal trial counsel was ineffective for failing to object to the State’s misstatement of the law during the State’s summation.” He acknowledges that to establish his claim he must prove both the breach of an essential duty and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

During closing argument, the prosecutor stated the following:

There was nobody that came in and said the defendant did not do it. And there were a hundred people to pick from and there was not anybody that said the defendant didn’t do it. The defendant is the only one that came in and said the defendant didn’t do it. He just doesn’t know what happened.

In *State v. Hanes*, 790 N.W.2d 545, 557 (Iowa 2010), the Iowa Supreme Court stated, “It was not proper for the State to attempt to shift the burden to the defense to call the witnesses or to suggest the jury could infer from the defense’s failure to call the witnesses that they would not have said anything helpful to the defense.” Prior to *Hanes*, the rule appeared to be narrower:

In the past we have expressed concern about prosecution arguments that focus on lack of evidence or failure to produce witnesses. . . . However, not all remarks relating to the evidence are forbidden. “A prosecutor may properly comment upon the defendant’s failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant’s own failure to testify.”

State v. Craig, 490 N.W.2d 795, 797 (Iowa 1992) (quoting *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986)). Because Musedinovic was tried when the seemingly narrower rule was in effect, the district court concluded his trial attorney did not breach an essential duty in failing to object to the prosecutor’s

comments. The court reasoned that “[t]rial counsel was not required to be a crystal [ball] gazer who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant.” See *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999).

This court reached the same conclusion under virtually identical circumstances. See *State v. Singh*, No. 10-1583, 2011 WL 5387279, at *3–5 (Iowa Ct. App. Nov. 9, 2011). While not binding, the reasoning of that opinion is persuasive authority for reaching the same result here. On our de novo review, we conclude Musedinovic’s trial attorney did not breach an essential duty in failing to object to the prosecutor’s comments during closing argument.

Assuming *Hanes* did not change the law, Musedinovic still fails on the *Strickland* prejudice prong; the jury was instructed that he was presumed innocent unless the evidence established he was guilty beyond a reasonable doubt and was further instructed that the burden of proving guilt rested with the State.

We affirm the denial of Musedinovic’s application for postconviction relief.

AFFIRMED.