

IN THE COURT OF APPEALS OF IOWA

No. 6-487 / 05-0889
Filed October 11, 2006

DONALD W. GOODRICH, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

A postconviction relief applicant appeals from the district court's order denying the application. **AFFIRMED.**

Michael O. Carpenter of Webber, Gaumer & Emanuel, P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Mark Tremmel, County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, J.

Donald Goodrich, Jr. appeals from the district court's order denying his application for postconviction relief. Because we agree that Goodrich was not denied effective assistance of counsel, we affirm the denial of his application.

I. Background Facts and Proceedings.

A reasonable juror could find the following facts from the record in this case. After a night of consuming large amounts of alcohol, Goodrich entered a bar in Ottumwa, Iowa. After ordering a beer, Goodrich exchanged fighting words with James Breeding, a fellow patron. The bartender, fearing Goodrich and Breeding were about to brawl, ordered both men to leave via separate exits. Goodrich proceeded to the bar's rear exit, stopped in the doorway, shouted profanities at Breeding, and dared him to fight. Breeding complied and fisticuffs ensued in the alleyway behind the bar. During the fight, Goodrich removed his Leatherman multipurpose tool from its sheath and stabbed Breeding five times. Breeding returned inside the bar, bleeding profusely, and fell to his knees. Goodrich ran down the alley, discarding his shirt and weapon. Breeding died shortly thereafter.

Goodrich was charged with first-degree murder. The jury returned a verdict of guilty in August 2000, which the Iowa Supreme Court affirmed by order in *State v. Goodrich*, No. 00-644 (Iowa 2002)¹ and also preserved any ineffective assistance of counsel claims for postconviction relief. Goodrich filed a pro se application for postconviction relief on October 27, 2003, which was recast by

¹ This court affirmed his conviction, and rejected his claims of ineffective assistance of counsel. *State v. Goodrich*, No. 00-1644 (Iowa Ct. App. May 15, 2002).

counsel on July 1, 2004. After a motion to dismiss by the State was overruled by the district court, Goodrich's application came to trial on February 24, 2005, on the following assertions of ineffective assistance of counsel: (1) failure to object to testimony regarding Goodrich seeking drugs; (2) failure to object to or move for mistrial based upon prosecutorial misconduct; (3) failure to timely file notice of defenses of intoxication and justification; (4) failure to pursue methamphetamine use as the basis for an intoxication defense; (5) failure to investigate possible *Brady* issues and otherwise challenge the testimony of Rick Rodden; (6) failure to make a motion for judgment of acquittal based upon sufficiency of the evidence; and (7) failure to object to judicial misconduct with the jury. The district court ruled upon Goodrich's application and denied it in its entirety, finding that counsel either did not breach a duty or that Goodrich failed to show how he was prejudiced by the claimed error. He now appeals on only the first four of the above issues.

II. Scope of review.

Postconviction proceedings are reviewed for errors of law. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). When a postconviction relief application raises an issue of constitutional scope, such as ineffective assistance of counsel in violation of the Sixth Amendment, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

III. Issues on Appeal—Ineffective Assistance.

Goodrich asserts four issues of ineffective assistance in this appeal. In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice

resulted. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). Counsel is not ineffective for failing to raise an issue with no merit, *State v. Wills*, 696 N.W.2d 20, 24 (Iowa 2005), and the failure to prove either a breach of an essential duty or prejudice is fatal to an ineffective assistance of counsel claim. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003).

Evidentiary Objections. Goodrich argues his counsel was ineffective for failing to object to questions pertaining to his quest for drugs the night Breeding was killed. Evidence of prior crimes is not admissible to show a general propensity to commit wrongful acts. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). However, even if such evidence has a tendency to demonstrate the defendant's bad character, it may be admitted if it is relevant and material to a legitimate issue. *Id.* Among the legitimate purposes for admission is an attempt to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b). In determining whether the probative value of the prior acts evidence is outweighed by any prejudicial effect,

The judge must consider "on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other hand, the degree to which the jury will probably be roused by the evidence to overmastering hostility."

State v. Rodriguez, 636 N.W.2d 234, 240 (Iowa 2001) (citations omitted).

The prosecutor engaged in the following line of questioning at trial with witness Phil LeGrand, who was present at The Keg bar that night:

Q: And did [Goodrich] actually talk to you at some point in time?

A: He asked me if I had any drugs.

[Defense Counsel]: Objection. Not responsive to the question.

Q: Did he ever speak to you? A: Yes.

Q: And what did he say?

[Defense Counsel]: Objection. Irrelevant and immaterial.

THE COURT: Overruled. Go ahead.

A: He asked me if I had any drugs.

Q: And describe the demeanor of Donald Goodrich. A: Agitated, intoxicated. He was just strange acting.

Another witness, Rick Rodden, testified without objection as to what Goodrich told him in a jailhouse conversation:

Q: Did [Goodrich] tell you why he went across the bridge? A: I think he was going to get some more meth or meth, if I remember directly.

Goodrich argues the evidence of his drug use was improper character evidence under Iowa Rule of Evidence 5.404(b) and more unfairly prejudicial than probative under Rule 5.403, making his counsel's failure to object on this basis a breach of duty. The State argues that the evidence was admissible to show Goodrich's strange behavior, the irrationality of his quarrel with a stranger, and that Goodrich opened the door to his drug use with an intoxication defense. The postconviction court found the evidence of Goodrich seeking drugs relevant as to proof of motive "in that he was tense because of his need for drugs, which led to a fight with a complete stranger." The court also found the danger of unfair prejudice did not outweigh its relevance. We agree with the postconviction court as well as with its finding that Goodrich failed to show prejudice such that the outcome of the trial would have been different without the drug-use evidence. As Goodrich admitted he stabbed Breeding, the sole issue in contention at trial was

whether Goodrich had the specific intent to kill Breeding. The evidence showed that Goodrich engaged in an argument with Breeding, that he escalated the exchange by challenging Breeding to a physical confrontation that ended in Breeding's stabbing death. He admitted to attempting to obscure his involvement by discarding the murder weapon and his bloody shirt. He also admitted to lying to police. Although he claimed self-defense and alcohol intoxication, the jury was free to evaluate his credibility and rejected the asserted defenses. Goodrich does not show how the exclusion of two brief instances of testimony regarding his seeking drugs would have altered the outcome of the trial. We fail to find prejudice and affirm on this issue.

Prosecutorial Misconduct. Goodrich claims several instances of prosecutorial misconduct were not objected to nor were raised on a motion for mistrial by his trial counsel. To prevail on a claim of prosecutorial misconduct, a defendant must establish that misconduct occurred and that he was so prejudiced by the misconduct that he was deprived of a fair trial. See *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002); *State v. Greene*, 592 N.W.2d 24, 30-31 (Iowa 1999). Thus it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. *Greene*, 592 N.W.2d at 31. In determining whether prosecutorial misconduct warrants a new trial, the court should consider such misconduct within the context of the entire trial, including the court's instructions. *Id.* at 32. Whether the misconduct was isolated or pervasive and the strength of the evidence against the defendant are all appropriate for the court to consider. *State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001).

Goodrich first contends that the prosecutor engaged in misconduct by “repeatedly characterizing Goodrich as agitated, weird, and irritated.” The record reveals testimony by numerous witnesses that Goodrich behaved strangely the night that he stabbed Breeding. In closing arguments, the prosecution is allowed some latitude and may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented. *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006). Such was the case here. The evidence supported the prosecutor’s characterization, and therefore trial counsel did not breach a duty by failing to lodge a meritless objection or move for mistrial based upon these statements. We affirm on this issue.

Goodrich next alleges the prosecutor invaded attorney-client privilege when cross-examining him as follows:

Q: Wouldn’t you expect [Breeding’s friends] to come outside? A: No. Because after we argued, he argued with me the first time, I was sitting there drinking my beer. And his buddy [came] over, telling me “You could whip his ass. He’s drunk.”

Q: That’s something you didn’t tell Mr. Neary. Is that also new information here Mr. Goodrich? A: No.

Q: In fact, did you throw the knife in the river before— A: No. It’s in the bush right there down towards the alley. Less than—

Q: Wait a second. Is this some information that you have told your attorneys? A: Yeah.

Michael Neary, one of Goodrich’s trial attorneys, testified at the postconviction hearing that those questions may have been objectionable. We agree with the postconviction court’s ruling, however, that the prosecutor was not attempting to invade privileged communications but was instead challenging Goodrich’s testimony on cross-examination as compared with what he told Mr. Neary on direct examination at trial. A fair reading of the trial transcript shows

that the prosecutor was attempting to challenge Goodrich's failure to mention these certain facts on direct examination when he had the opportunity and highlight these inconsistencies with Goodrich's testimony on cross. Obviously, testimony at trial is not privileged communication, and the prosecutor was entitled to impeach the witness and point out inconsistencies in testimony. See Iowa R. Crim. P. 2.20 (stating the defendant may be cross-examined as an ordinary witness, but the state shall be strictly confined therein to the matters testified to in the examination in chief); Iowa R. Evid. 5.611.

Goodrich also contends that the prosecutor improperly commented during cross-examination and in closing arguments about his pre-arrest silence. A review of these portions of the record reveals that the prosecutor challenged Goodrich's defense claims by highlighting his failure to come forward to the police following the stabbing. This called into question the validity of Goodrich's statements and defenses made both before and at trial. Inquiring about pre-arrest silence to impeach a criminal defendant's credibility in light of a self-defense claim to first-degree murder is constitutionally permissible, *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86, 95-96 (1980), as is inquiry on post-arrest silence when a defendant has waived his right to remain silent by voluntarily engaging in conversation about the events leading to his arrest and testifying in his own behalf. See *State v. Bass*, 349 N.W.2d 498, 503 (Iowa 1984) (finding inquiry into post-arrest silence as the defendant disregards his right to remain silent and generally denied his guilt because the concern for preserving the constitutional protections of one who has relied on such protections is no longer present). We therefore conclude no duty existed on

behalf of Goodrich's trial counsel to challenge this line of questioning or closing argument statements as to his pre-arrest silence and affirm as to this issue.²

Goodrich's final issue of prosecutorial misconduct entails multiple statements made during closing arguments that Goodrich had lied. Our case law holds that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments. *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003).³ Notwithstanding this prohibition, a prosecutor is still free "to craft an argument that includes reasonable inferences based on the evidence and. . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable." *Id.* (quoting *State v. Davis*, 61 P.3d 701, 710, 711 (Kan. 2003)).

The following questions must be answered to determine whether the prosecutor's remarks made in the case before us were proper: (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Id. at 874-875.

During closing arguments, the prosecutor made the following statements:

² Goodrich also argues on appeal that comments during closing arguments about his pre-arrest silence were objectionable as more prejudicial than probative under Rule 5.403. This ground is waived for purposes of appeal as it was not raised or ruled upon by the postconviction court. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997).

³ We note that Goodrich's criminal trial occurred prior to the filing of the supreme court's opinion in *State v. Graves*.

This is another key to Donald Goodrich's state of mind on the night—or morning of January 8th, 2000. Donald Goodrich lies about almost everything. He lied about—this is to the police when they finally did catch up with him. He lied about where he was. He lied about who he was with. He lied about his car. He lied about everything. He lied about being at the Keg. He lied about what time he left the Stallion. He lied about being with Steve Wickersheim.

He lied—there were omissions that he made out of his interview. He didn't say he was ever with Linda Kinney or Karen Steinnagle. He never said he went to the Riverside. All of those things he did now and they come in and roll right off his tongue to you. Keep in mind he's now had six months to think about it.

On that night, though, when he had the chance to tell the police what he says really happened and his testimony today, he didn't do it. He lies. You know he's been convicted of theft a couple times. This certainly goes to his credibility, I would think, but he lies about who he was with and where he was and what he did.

People who don't have anything to hide don't lie. If he was acting in self-defense, he wouldn't have come up with this story that he fed to the police. He was trying to cover his tracks. That's what he was trying to do. He did a very poor job of it.

To evaluate the propriety of the prosecutor's statements, we refer back to the trial testimony. Goodrich testified on cross-examination as follows:

Q: Your attorney just characterized what you told the police as misinformation? A: Yes.

Q: In fact, you lied to the police? A: Yes, I did.

Q: You lied about everything you did that night for the most part, isn't that true? A: No, half of it.

Q: Well, the half that while you were at The Keg? A: Yes.

Q: You didn't tell them anything about it, did you? A: No, I did not.

Q: Never told them you went to The Keg at one time at all during that night? A: No, I did not.

Q: You never told the police—well, you told the police about Steve Wickersheim and being with him? A: I just said that.

Q: You just said, but that wasn't true either? A: Yes.

Q: That was a lie also? A: Yes, it was.

Q: And you lied about when you left the Stallion? A: I didn't know exactly what time, no.

Q: So you pretty much lied about everywhere you were on January 8th, 2000, early morning? A: Not everything, no.

Q: You lied to the police about your car, isn't that true? A: Yes, I did.

Q: You seem to have a pretty clear recollection today, six months or so after this took place, wouldn't that be true? A: Yes.

Q: I assume you would have had the same recollection back on January 8th of 2000 when you were interviewed by Agent Michael Berrier? A: Yes.

Q: You've been convicted of theft two separate times? A: Yes.

Although the prosecutor's comments in closing arguments were pointed and strong, they were made in the context of references to the evidence and not as an expression of the prosecutor's personal opinion. See *Graves*, 668 N.W.2d at 875. Several times, the prosecutor cited specific evidence which undermined Goodrich's veracity. Goodrich himself admitted to having lied multiple times, and the prosecutor encouraged the jury to recall those instances. We do not think the prosecutor expressed a personal opinion that the defendant was lying but rather argued from the record testimony. See *Id.* Although the argument was strong, we agree with the postconviction court that these statements were no more than legitimate representations and inferences closely tied to the evidence presented at trial that Goodrich had been untruthful, and did not amount to prosecutorial misconduct. Because of this determination, any objection or motion for mistrial based upon these statements would have been meritless and not a showing of ineffective assistance of counsel. We affirm as to this issue.

Notice of Defenses. Goodrich next contends his trial counsel was ineffective for failing to timely file notices of his self-defense/justification and intoxication (alcohol) defenses. The postconviction court found that Goodrich's own actions prevented timely notice, as he failed to admit his involvement in the stabbing to his attorneys until after the pretrial motion deadline and only days before trial, having previously insisted that he was not at the crime scene. In addition, the court rejected this argument, as the State did not oppose the late

filing of these defenses and the defenses were actually argued and submitted with pertinent instructions to the jury. Consequently, we agree with the ruling that Goodrich did not show how he might have been prejudiced from the failure to file timely notices of defenses as the jury actually considered the claims. We affirm as to this issue.

Failure to Seek Drug Intoxication Defense. Finally, Goodrich argues that his trial counsel failed to pursue drug intoxication, specifically methamphetamine, as a defense. Goodrich claimed he told one of his attorneys about his drug use, though the postconviction court found this statement not credible as compared to each trial counsel's testimony that he did not inform them of drug usage before trial. This argument was also rejected by the postconviction court, as it found no evidence that Goodrich informed his trial counsel that he was under the influence of methamphetamine at the time of the stabbing. We agree with the court that counsel could not have breached an essential duty for failing to act on allegations of which they were not aware. We affirm on this issue and the denial of Goodrich's postconviction application in its entirety.

AFFIRMED.