

IN THE COURT OF APPEALS OF IOWA

No. 7-225 / 06-0369
Filed May 23, 2007

JOHN GRAVES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

John Graves appeals the denial of his postconviction relief application.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney
General, John P. Sarcone, County Attorney, and Michael T. Hunter, Assistant
County Attorney, for appellee State.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

John Graves appeals the denial of his postconviction relief application. He claims he received ineffective assistance of counsel when his counsel failed to object to prosecutorial misconduct. Graves also claims his trial, appellate, and postconviction counsel rendered ineffective assistance when they failed to object to (1) the State's "golden rule" argument and (2) the jury instruction for felony murder by willful injury. We affirm.

I. Background Facts and Proceedings

Graves was convicted of first-degree murder of Darlene Avant, a known prostitute and drug user. He appealed his conviction, and we affirmed. *State v. Graves*, No. 01-0629 (Iowa Ct. App. May 15, 2002). He now brings this action for postconviction relief alleging he received ineffective assistance of counsel.

First, Graves claims his counsel should have objected to statements the prosecutor made during closing argument. The statements are as follows:

(1) Now, [defense counsel] is going to say it is too embarrassing to call the police when you've got a prostitute in your house. Ladies and gentlemen, that's so weak.

(2) Ladies and gentlemen, consider what he does after he kills her. Everything he does is an attempt to cover up. He cleans up. He uses bleach. He lies to his girlfriend. He lied to police. And I submit he lies to you, ladies and gentlemen.

(3) Now let's go back and look at the instruction on justification. . . . You know, ladies and gentlemen, and I'm going to tell you right now, you can't believe a word this defendant says. He's a convicted felon and he's got an interest in this case.

(4) And you know what? He is planning to go to work the next day. He comes home and cleans up, tries to clean up the blood, lies about it, does all those things. And do you think he is going to come in here and tell you the truth? No. He didn't tell the truth.

Second, Graves argues his counsel should have objected to the “golden rule” argument. During his closing argument, the prosecutor stated, “Ladies and gentlemen, tell Mr. Graves with your verdict that she was more than just a prostitute. Tell him with your verdict that she was someone’s friend, she was someone’s daughter, she was someone’s sister.” Defense counsel did not object. Finally, he argues counsel should have objected to the jury instruction on felony murder and willful injury. The jury was instructed on both first-degree murder based on premeditation and malice aforethought pursuant to Iowa Code sections 707.1, 707.2(1), and 707.2(2) (1999) and felony murder and willful injury pursuant to sections 708.4 and 702.11.¹ The jury rendered a general verdict, finding Graves guilty of first-degree murder.

The postconviction relief court determined the prosecutor’s first and third statements did not rise to the level of misconduct. Further, it found Graves was not prejudiced by the other statements. Finally, the court dismissed Graves’s other challenges and denied his application for postconviction relief. Graves appeals.

II. Standard of Review

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo.

¹ Graves’s trial occurred prior to the supreme court’s holding in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), in which the court stated: “[I]f the act causing willful injury is the same act that causes the victim’s death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes.”

Nguyen v. State, 707 N.W.2d 317, 322-23 (Iowa 2005); *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998).

III. Merits

A. Prosecutorial Misconduct

To evaluate an ineffective assistance of counsel claim based on prosecutorial misconduct, we must examine the merits of the prosecutorial misconduct claim. *State v. Graves*, 668 N.W.2d 860, 869-70 (Iowa 2003). We look for two elements: proof of misconduct and resultant prejudice. If either element is missing, we need not answer whether Graves's counsel rendered ineffective assistance by failing to object to the prosecutor's conduct. *Nguyen*, 707 N.W.2d at 324; *Graves*, 668 N.W.2d at 870. In determining whether there was prejudice from prosecutorial misconduct,

[w]e consider (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 869.

We agree with the postconviction court's analysis of this issue. In the first and third statements cited above, the prosecutor was arguing reasonable inferences and conclusions that could be drawn from the evidence. See *id.* at 874. As for the rest of the comments, Graves cannot show he was prejudiced. Lying was not the theme of the State's case, and the prosecutor's comments were not severe and pervasive. See *Nguyen*, 707 N.W.2d at 317. Graves's own attorney, in his opening statement, addressed the lies Graves told to cover up the

crime. See *Graves*, 668 N.W.2d at 878. Finally, the State's evidence against Graves was strong. See *Nguyen*, 707 N.W.2d at 326. Graves's prosecutorial misconduct claim must fail.

B. Golden Rule Argument

Graves also argues his counsel failed to object to the State's improper "golden rule" argument. Essentially, a golden rule argument persuades jurors to put themselves in the place of witnesses or parties. Contrary to Graves's claim, the prosecutor's statement did not ask jurors to put themselves in the place of the victim or any witnesses. Instead, it cautioned them against excusing Graves's crime because the victim practiced an illegal and socially disreputable profession. Jurors were only being admonished to ignore their own possible bias toward the victim. Even if the argument was improper, Graves cannot show prejudice for the reasons stated above. Because Graves cannot meet the burden for his prosecutorial misconduct claim, he cannot show ineffective assistance of counsel. *Nguyen*, 707 N.W.2d at 324; *Graves*, 668 N.W.2d at 870.

C. Felony Murder

Finally, Graves argues his trial, appellate, and postconviction counsel rendered ineffective assistance for failing to object to the felony murder and willful injury jury instructions. The burden of proof for showing ineffective assistance is the same for all three types of counsel. See *Cox v. State*, 554 N.W.2d 712, 715 (Iowa 1996); *Patchette v. State*, 374 N.W.2d 397, 399 (Iowa 1985). Graves must show (1) his counsel breached an essential duty and (2) the

breach prejudiced the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Graves's argument is based on the application of *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), to his case. That case, however, was decided after Graves's trial and direct appeal. Until *Heemstra*, the instructions given at Graves's trial were commensurate with the law. See *Heemstra*, 721 N.W.2d at 557-58. His counsel had no duty to anticipate the change. See *State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003).

Furthermore, according to *Heemstra*,

The rule of law announced in this case regarding the use of willful injury as a predicated felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.

Id.

Graves relies on *Teague v. Lane*, 489 U.S. 288, 299-300, 109 S. Ct. 1060, 1069-70, 103 L. Ed. 2d 334, 349 (1989), for the proposition that "once a new [constitutional rule of criminal procedure] is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Graves's argument is inapposite. We need not reach the question of retroactivity Graves urges because *Heemstra* did not announce a new constitutional rule of criminal procedure. Instead, the case interpreted a state statute. The Supreme Court cannot construe a state statute, whether it is procedural or substantive in nature, differently from the construction rendered by the state's highest court. *Johnson v. Fankell*, 520 U.S. 911, 916,

117 S. Ct. 1800, 1803-04, 138 L. Ed. 2d 108, 115 (1997). Therefore, the new law established in *Heemstra* is not applicable to Graves.

The district court's judgment is affirmed.

AFFIRMED.