

**IN THE COURT OF APPEALS OF IOWA**

No. 7-364 / 06-1388  
Filed August 22, 2007

**KARL VOLL,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Mills County, James S. Heckerman, Judge.

Karl Voll appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Ryan M. Sewell, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Marci L. Prier, County Attorney, and Eric Hansen, Assistant County Attorney, for appellee State.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

**ZIMMER, J.**

Karl Voll appeals from the district court's denial of his application for postconviction relief. Voll contends the court should have concluded his trial counsel was ineffective for (1) failing to move to strike the testimony of a witness that allegedly violated a ruling on a motion in limine, (2) failing to object to the prosecution's cross-examination of himself and a defense witness regarding the veracity of their testimony and the veracity of prosecution witnesses, and (3) failing to request the reporting of opening and closing arguments. We affirm the district court's decision.

***I. Background Facts and Proceedings***

On April 5, 2001, Voll and his wife, Maria, were notified that Maria's daughter, Jessica Whetsel, had drugs in her possession at school. Voll and Maria agreed to assist with a sting operation to apprehend the individuals who supplied Whetsel with drugs in order to help Whetsel avoid a lengthy sentence for drug possession. Whetsel told Voll she owed "the Vasquez brothers" fifty dollars for the drugs, so Voll's wife agreed to wear a wire, visit Mike and Nick Vasquez, and attempt to pay Whetsel's debt. Following the sting operation, the Vasquez brothers were arrested, but they did not remain in custody for very long. Rumors soon circulated that Whetsel and the Volls would be hurt because they set up the Vasquez brothers.

On May 11, 2001, Voll went to the Vasquez apartment and began to argue with Nick Vasquez. The argument soon became heated, and Voll shot Vasquez in the face in the presence of several witnesses. Voll's truck was seen speeding from the scene, and Voll was arrested by the police a short time later.

At Voll's trial, four eyewitnesses testified they saw him shoot Vasquez. Three other witnesses saw Voll fleeing the scene following the shooting. Testimony at trial revealed Estil Richmond owned the house where Voll was living at the time of the shooting. Richmond owned a .357 Colt, which he discovered missing the day after the shooting. Bullet fragments found in Vasquez's head matched bullets owned by Richmond.

Following a jury trial, Voll was found guilty of attempted murder, assault causing bodily injury, and going armed with intent. Voll appealed from the judgment and sentence entered by the district court. We affirmed his conviction on direct appeal. *State v. Voll*, 655 N.W.2d 548, 549 (Iowa Ct. App. 2002). Our supreme court denied Voll's application for further review.

Voll subsequently filed an application for postconviction relief. He alleged his trial counsel was ineffective in several respects. Following hearing, the postconviction court addressed and rejected each of Voll's claims in a ruling filed July 31, 2006. Voll has appealed from the postconviction court's ruling.

## ***II. Scope of Review***

Postconviction proceedings are generally reviewed for the correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, because Voll asserts violations of constitutional safeguards, including ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. *Origer v. State*, 495 N.W.2d 132, 135 (Iowa Ct. App. 1992). This is the equivalent of de novo review. *Id.*

### **III. Discussion**

On appeal, Voll reasserts his claim that his trial counsel was ineffective. To establish ineffective assistance of counsel, Voll must prove (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish breach of duty, a defendant must overcome the presumption counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). A defendant may establish prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Voll's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). With these principles in mind, we now address Voll's appellate claims in turn.

Voll first asserts his trial counsel was ineffective for failing to move to strike the testimony of a witness that allegedly violated a ruling on a motion in limine. Defense counsel filed a motion in limine asking the court to prohibit the admission of any evidence about Voll's criminal history, which the court granted. Donald Oswald, a witness for the State who worked for the Glenwood Resource Center, testified he saw Voll driving his green and white pickup the night he shot Vasquez. Oswald was asked how he knew the defendant, and he answered, "I've seen him around, through the system, had a few little incidents with him." Voll asserts this testimony violated the order on the motion in limine and alerted the jury to his criminal history.

The State contends Voll's counsel did not breach any duty by failing to move to strike Oswald's testimony. Upon review of the record, we agree. Oswald did not testify about the functions of the Glenwood Resource Center or explain his role there. He testified he "take[s] care of clients, night watch." Oswald did not testify that any of the clients at the Glenwood Resource Center had criminal records or that Voll had a criminal record. Furthermore, Oswald was not a law enforcement official, and we cannot conclude the jury would have assumed the Glenwood Resource Center "system" was the criminal justice system.<sup>1</sup> We conclude defense counsel did not breach a duty by failing to move to strike the challenged testimony. Accordingly, we reject this assignment of error.

Voll next asserts his trial counsel was ineffective for failing to object to the prosecution's cross-examination of himself and a defense witness regarding the veracity of their testimony and the veracity of prosecution witnesses.

Maria Voll testified for the defense. On cross-examination, she was asked if the testimony of Detective Gerald "Bo" Wake was truthful:

Q. Okay. Do you remember him [Voll] saying, guns aren't my thing anymore, but if I have to I'll get one and take care of the thing myself? A. I remember him saying, guns aren't my thing. He never said he would get one.

Q. So Bo lied about that? A. Yes, he did.

Karl Voll was also cross-examined about the veracity of other witnesses:

Q. Then how do all these people see your pickup in town?  
A. Because that's all they've ever seen me driving or in my house or ever, for that matter, heard my daughter talk of driving. She wanted that pickup truck very badly.

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<sup>1</sup> The Glenwood Resource Center is a facility run by the Iowa Department of Human Resources providing services to individuals with developmental disabilities.

Q. Allison Render know you from a hole in the ground, it's your pickup? A. It's the only one like it of its kind around here, as far as I know.

Q. She saw it tearing down Locust Street right after all the commotion started. A. I don't believe so.

Q. Why would she lie? A. I have no idea. My pickup truck was not in town.

Q. And why would Josh Leonard, who was just going to work at about 12 after 8:00, ten after 8:00, said you about ran him off the road coming into P.J. from the north. A. No, I didn't run anybody off the road.

Q. So he lied too? A. Pretty much so.

The defendant maintains his trial counsel should have objected to the prosecution's cross-examination.

In *State v. Graves*, 668 N.W.2d 860, 873, 876 (Iowa 2003), our supreme court held a prosecutor engages in misconduct by asking the defendant at trial whether other witnesses are lying, calling the defendant a liar, stating the defendant is lying, or making other similar, disparaging comments. The controlling factor supporting prejudice in *Graves* was the "pervasive manner in which the error was used to obtain a conviction." *Nguyen v. State*, 707 N.W.2d 317, 324 (Iowa 2005). In *Graves*, the prosecutor's improper cross-examination and argument was "not isolated, but rather became a central theme of the government's prosecution." See 668 N.W.2d at 878-81 (finding pervasive misconduct where the prosecutor aggressively cross-examined the defendant with "liar" questions, told the jury in closing argument the defendant called the State's witness a liar, and repeatedly referred to the defendant as a liar); see also *Bowman v. State*, 710 N.W.2d 200, 204, 206 (Iowa 2006) (finding prejudice existed where the prosecutor engaged in improper questioning "at least eight

different times” and “initiated an all-out, name-calling attack” on the defendant’s credibility during closing argument).

In this case, the State concedes the prosecutor’s questions about whether Allison Render was lying and the cross-examination of Maria Voll regarding Detective Wake’s veracity were improper based on our supreme court’s pronouncements in *Graves*. However, the State argues Voll suffered no prejudice because the questions regarding the veracity of other witnesses were isolated, brief incidents, which were too fleeting to have affected the outcome of Voll’s trial. Upon our review of the record, we agree.

The prosecutor’s questions about the veracity of Detective Wake, Allison Render, and Josh Leonard were brief references. The questions about Render’s testimony concerned the defendant’s presence in town, not the circumstances surrounding the shooting. We conclude the cross-examination misconduct in this case was not severe or pervasive, and in contrast to *Graves* and *Bowman*, the issue of lying did not become a central theme in this case. The defendant does not contend an improper closing argument was made in this case. Finally, the evidence against Voll was overwhelming. Four eyewitnesses to the shooting testified the defendant shot Vasquez. Three witnesses saw Voll fleeing the scene following the shooting. The gun used in the shooting matched one that went missing from the home where Voll lived. Bullets found in the home where Voll lived matched the bullet fragments removed from Nick Vasquez’s head. We conclude it is not reasonably probable the result of the defendant’s trial would have been different had the disputed cross-examination been excluded. Therefore, Voll has failed to establish he was prejudiced.

Voll also contends the cross-examination regarding his own credibility and inconsistencies between his trial testimony and previous statements was improper. Voll was briefly questioned about his veracity on cross-examination:

Q. So you lied to the officer then. A. I said I started denying everything when I was accused of shooting someone.

Q. Well, not only denying. You flat out lied. A. That's pretty much it, yes.

Q. All the time you kept saying, I'm being straight with you, I'm telling you the truth. You were lying to them about that, weren't you? A. Not for the most part, no. They were talking of several situations at one time.

Q. But you lied to them about ever stopping at 510 South Locust. A. As I said, at first, no. After I was accused, yes.

Q. You lied to them about getting out of your truck? A. My car, yes, afterwards, yes.

A defendant who takes the stand submits him or herself to cross-examination the same as any other witness. *State v. Connor*, 241 N.W.2d 447, 455 (Iowa 1976).

A defendant who takes the stand also submits him or herself to the same tests of memory and credibility. *State v. Carey*, 165 N.W.2d 27, 30 (Iowa 1969). It is relevant whether Voll provided false information to a police officer regarding the circumstances of the crime because a false story may indicate guilt. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). We find defense counsel did not breach any duty by failing to object to the State's cross-examination of Voll regarding his own credibility. Further, even if we assume *arguendo* that these questions were improper, we find Voll has failed to demonstrate prejudice.

Voll's final contention is that his counsel was ineffective for failing to request the reporting of opening and closing arguments to allow his subsequent counsel to properly present claims that the prosecutor's misconduct in questioning the veracity of witnesses might have carried into closing arguments.

Voll has not asserted any specific error occurred during the course of closing arguments. When the district court does nothing to prohibit the transcription of arguments, the lack of reporting does not create prejudicial error. *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000). The defendant must allege that something untoward occurred during any stage of these proceedings. *Id.* In this case, Voll has failed to allege or prove he was prejudiced by any statements that might have been made in closing argument. Therefore, we reject this assignment of error.

#### **IV. Conclusion**

We conclude Voll's trial counsel did not breach any duty by failing to move to strike Oswald's testimony, and Voll failed to prove he was prejudiced by trial counsel's failure to object to prosecutorial misconduct. We also reject Voll's claim that his counsel was ineffective for failing to request the reporting of opening and closing arguments. We affirm the district court's decision to deny his application for postconviction relief.

**AFFIRMED.**