

IN THE COURT OF APPEALS OF IOWA

No. 7-537 / 06-0857
Filed October 24, 2007

SEAN PATRICK O'GEARY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, David L. Baker,
Judge.

Defendant appeals the district court's order denying his petition for
postconviction relief. **AFFIRMED.**

Jon M. Kinnamon and Jerald W. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Harold Denton, County Attorney, and Todd Tripp, Assistant County
Attorney, for appellee State.

Heard by Sackett, C.J., and Huitink and Vogel, JJ. Baker, J., takes no
part.

HUITINK, J.

Sean Patrick O'Geary appeals the district court's order denying his petition for postconviction relief. We affirm.

I. Prior Proceedings

O'Geary was convicted by jury of the first-degree murder of two-year-old Mercedes Blough on August 10, 1998. We affirmed the conviction on December 27, 1999. The Iowa Supreme Court granted further review on the ineffective assistance of counsel issues. In its brief ruling, the court stated

Because we believe that the appellate record is insufficient to address defendant's ineffective assistance of counsel claims regarding whether counsel should have moved for a mistrial and should have insisted on the live testimony of Jessica Blough, we preserve those challenges for a possible postconviction relief proceeding. The portion of the court of appeals decision rejecting those ineffectiveness claims is vacated. In all other respects, the defendant's conviction and the court of appeals' decision are affirmed.

State v. O'Geary, No. 98-1965 (Iowa March 3, 2000) (internal citation omitted).

O'Geary filed the present application for postconviction relief claiming he received ineffective assistance of counsel and also requesting a new trial because of newly discovered evidence. The district court denied O'Geary's application for postconviction relief.

On appeal O'Geary contends the trial court erred in denying his petition for postconviction relief. He claims his trial counsel was ineffective in: (1) failing to adequately challenge a motion to quash, (2) violating O'Geary's rights to confrontation and compulsory process, (3) failing to object to a specific jury instruction, (4) failing to allege inconsistent prosecutorial theories, (5) failing to request a mistrial following the testimony of two police detectives, (6) failing to

call an expert biomechanical engineer, (7) failing to object to a question propounded by the prosecution to the defendant, (8) failing to challenge the “creation of evidence” of a wall strike, and (9) failing to challenge the prosecutor’s statement that the victim’s head injury did not emanate from an accident. He also contends appellate counsel was ineffective in not challenging the sufficiency of the evidence or challenging the alleged prosecutorial misconduct on direct appeal. He also contends his conviction should be reversed on the basis of newly discovered evidence and “material facts not previously presented or heard that requires vacation of the conviction of sentence in the interest of justice.”

II. Background Facts

The following facts were set forth in our opinion on direct appeal:

Under the State’s theory, Mercedes was the victim of shaken baby syndrome and died of resulting brain trauma.

At trial the State offered multiple expert witnesses whose testimonial opinions were consistent with the State’s theory of shaken baby syndrome. These experts unanimously rejected any notion that Mercedes’s head and brain injuries were the result of an accidental fall.

The State presented evidence indicating O’Geary had physically abused Mercedes on other occasions. This evidence included a large number of bite marks on Mercedes’s body, welts on her buttocks, and bruises on her head and chest. The State’s case also included testimony from hospital personnel and investigators concerning facts and statements gathered in the course of their inquiries into the cause of Mercedes’s injuries.

O’Geary denied responsibility for Mercedes’s injuries or death. He claimed Mercedes’s injuries were accidentally sustained when she either fell from her crib or down the stairs of the residence O’Geary shared with her mother, Jessica Blough. Testimony from O’Geary’s medical experts contradicted claims made by the State’s experts that Mercedes’s head and brain injuries were exclusively nonaccidental. . . .

O’Geary initially denied but later conceded responsibility for the bite marks found on Mercedes’s body. He also acknowledged spanking and bruising Mercedes’s buttocks but claimed his actions were justified by her misbehavior.

State v. O'Geary, No. 98-1965 (Iowa Ct. App. Dec. 27, 1999).

III. Merits

A. Ineffective Assistance of Counsel.

We conduct a de novo review of ineffective assistance claims. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To establish a claim of ineffective assistance of counsel, O'Geary has the burden to prove (1) his counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish a breach of duty, he must overcome the presumption that his attorneys were competent and prove that their performance was not within the range of normal competency. *Id.* To establish prejudice, he must show 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). If O'Geary fails to prove either prong, his ineffective assistance claim fails. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The standards for evaluating trial and appellate counsel are the same. *Id.* at 141.

Effective assistance of counsel does not mean every mistake in judgment or error in trial strategy by an attorney serves to deprive an accused of a constitutional right. *State v. Killpack*, 276 N.W.2d 368, 372 (Iowa 1979). Miscalculated tactics do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Error Preservation. The State claims O'Geary failed to preserve error on most of his ineffective assistance claims because they were not raised during his 1999 direct appeal. Iowa Code section 814.7 (2005) allows a defendant to raise

ineffective-assistance-of-counsel claims for the first time in postconviction proceedings. This section went into effect on July 1, 2004. The State claims section 814.7 does not apply to the present case because of our rule that “statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered,” and the criminal judgment against O’Geary occurred long before the effective date of section 814.7. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003) (quoting *Ontjes v. McNider*, 224 Iowa 115, 118, 275 N.W. 328, 330 (1937)).

In light of our supreme court’s recent decision in *Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007), holding that section 814.7 has retroactive applicability, we reject the State’s error preservation argument and find these ineffective assistance claims were properly preserved for our review.

1. Failure to Adequately Challenge the Motion to Quash

In the minutes of testimony, the State originally listed Jessica Blough as a witness against O’Geary. However, during pretrial proceedings, the prosecutor informed the defense he was not going to call Jessica as a witness nor grant her formal immunity. O’Geary subpoenaed Jessica for a pretrial deposition anyway. Jessica answered some of trial counsel’s questions, but invoked her Fifth Amendment privilege to refuse to respond to other questions. O’Geary’s trial counsel subpoenaed Jessica to testify at trial. Jessica’s attorney filed a motion to quash the trial subpoena. Jessica informed the court she was charged with child neglect and the charges arose out of the same facts and circumstances in O’Geary’s murder trial.

O'Geary's trial counsel argued, among other things, that the subpoena should not be quashed because "the Fifth Amendment privilege against self-incrimination would not be implicated because the answers which we would seek to elicit would not be incriminating." The district court granted Jessica's motion to quash. In doing so, the court stated

In view of the fact that Jessica Blough is a Defendant in a companion case and her attorney has informed the Court that she will assert the Fifth Amendment to virtually every question that may be asked of her if she is called to testify in this case by either the State or the Defendant, the Court has no option but to sustain the Motion to Quash the trial subpoena.

O'Geary now claims his trial counsel was "ineffective in allowing the supervisory role of the court to be bypassed" because he did not disclose to the trial court Jessica's statements to government officials or challenge the trial court's conclusion that it had "no option" but to grant the motion to quash.

Because we find there is not a reasonable probability the trial court would have overruled the motion to quash had O'Geary's trial counsel made the additional arguments now urged by his postconviction counsel, we find O'Geary has failed to prove ineffective assistance on this issue.

2. Confrontation and Compulsory Process

O'Geary's trial counsel made the strategic decision to use Jessica as a witness for the defense. This was consistent with O'Geary's overall trial strategy to claim that Mercedes's injuries were the result of an accident rather than an inflicted injury. Indeed, portions of her deposition testimony corroborated O'Geary's claim that there was a "really big bang" that could have been made by Mercedes falling the night before the injuries were discovered. Also, this

deposition testimony contained Jessica's statement that she "[n]ever" thought O'Geary posed a danger to Mercedes.

When the court quashed O'Geary's motion to subpoena Jessica, his trial counsel asked the court to allow Jessica's deposition testimony into evidence. The court ruled both parties would be allowed to present portions of the deposition testimony to the jury. Some discussion regarding what portions of the deposition testimony would be allowed into evidence occurred in chambers, without O'Geary. After these chamber discussions, the court reconvened, and O'Geary was present. At this time, his trial counsel successfully argued that certain portions of the deposition favorable to the State should be kept from the jury.

O'Geary now claims his trial counsel was ineffective because entering portions of this deposition into evidence, without the benefit of cross-examination, denied him his right to compulsory process and his right to confront Jessica.¹

We disagree. As noted above, the court ruled O'Geary could not subpoena Jessica as a live witness at trial. Trial counsel wanted to introduce several pieces of her deposition testimony that were helpful to O'Geary's defense, so he made the strategic decision to request to use her deposition testimony in lieu of her live testimony.

¹ We reject any claim that his counsel was ineffective because he did not tell O'Geary exactly, line by line, which portions of the deposition testimony were going to come into evidence. This argument is based on O'Geary's belief that his trial counsel bartered with the State to determine which portions of the testimony would be allowed at trial. We find no evidence of any such agreement because trial counsel lodged objections and successfully excluded portions of the transcript that were damaging to the defense. Therefore, we find no proof his trial counsel failed to perform an essential duty.

“In deciding whether trial counsel’s performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently.” *Reese v. State*, 391 N.W.2d 719, 721 (Iowa Ct. App. 1986). Trial counsel made a strategic decision to use portions of Jessica’s deposition testimony to bolster O’Geary’s defense. Upon our review of the deposition testimony presented at trial, we find this was a reasonable decision, and we will not second-guess this strategy on appeal. We also find O’Geary has failed to prove how his counsel’s decision prejudiced his case. We find no ineffective assistance here.

3. Failure to Object to Jury Instructions

O’Geary argues his trial counsel was ineffective because he did not object when the court used a uniform jury instruction to instruct the jury on the elements of first-degree murder, rather than using an alternative instruction that O’Geary’s postconviction counsel believes more accurately reflects the state of the law pursuant to the Iowa Supreme Court’s decision in *State v. Thompson*, 570 N.W.2d 765 (Iowa 1997).

We, like the postconviction court, find O’Geary failed to prove his trial counsel breached an essential duty when he did not object to the uniform instruction given in this case. The uniform jury instruction used during trial directly cites the *Thompson* case as authority for one section of the instruction. Regardless of the strength of O’Geary’s argument that this instruction, which is still in use today, improperly interprets *Thompson*, we find O’Geary has not proved his trial counsel failed to perform an essential duty when he did not object to its use. We also find O’Geary has failed to show there is a reasonable

probability that, but for trial counsel's alleged error, the trial result would have been different had the jury received his postconviction counsel's proposed instruction.

4. Insufficiency of the Evidence Claims

O'Geary contends his appellate counsel failed to raise on direct appeal the claim that there was insufficient evidence to prove (1) Mercedes's head trauma was caused by any intentional act by O'Geary and (2) O'Geary had "custody and control" of Mercedes at the time she received her head trauma.

While O'Geary's appellate counsel did not claim there was insufficient evidence to support the verdict, he did argue the court should have granted his motion for a new trial because the verdict was "contrary to the evidence." In our ruling on this issue on direct appeal we stated,

The record discloses abundant evidentiary support for the trial court's disposition of O'Geary's motion for a new trial. The State's claim that Mercedes's injuries were inflicted and nonaccidental was supported by considerable expert medical testimony. O'Geary was implicated by evidence of his relationship with Mercedes and her mother. Moreover, O'Geary's history of physically abusing Mercedes and false statements to investigators are facts supporting inferences of guilt. We affirm on this issue.

State v. O'Geary, No. 98-1965 (Iowa Ct. App. Dec. 27, 1999) (internal citations omitted).

In light of the decision on direct appeal finding the verdict was not contrary to the evidence and our own review of the evidence, we find O'Geary has failed to prove the appellate ruling would have been different had his trial counsel raised these sufficiency-of-the-evidence arguments on appeal. As noted, there was considerable expert testimony to support the charge that the injuries were

inflicted and nonaccidental. Similarly, there was substantial evidence to support the elements of custody and control. We find no ineffective assistance here.

5. Inconsistent Prosecutorial Theories

O'Geary claims his trial counsel and appellate counsel were ineffective in failing to raise the claim of inconsistent prosecutorial theory on the issue of custody and control. O'Geary claims:

It was an inconsistent prosecutorial theory for the same prosecutor to accuse Sean to be in custody and control of Mercedes, and to also accuse Jessica at her own trial on a charge of Neglect of Child to have custody of Mercedes during the same time interval.

We find this issue meritless. Jessica's trial focused on her acts in neglecting Mercedes by allowing her to inhale marijuana smoke at some point before she incurred the head trauma and failing to promptly contact emergency medical personnel during the hours after the head trauma. The neglect charges against Jessica did not involve the time interval when Mercedes received the injury. Also, the prosecutor did not need to discredit the evidence he offered in O'Geary's trial in order to convict Jessica. We affirm on this issue. See *State v. Hoskins*, 586 N.W.2d 707, 710 (Iowa 1998) (concluding counsel was not ineffective for failing to pursue a meritless issue).

6. Prosecutorial Misconduct

O'Geary contends the prosecutor committed prosecutorial misconduct during trial and closing argument. He contends his trial counsel provided ineffective assistance by not objecting to the prosecutor's alleged misconduct.

In order to establish his trial counsel provided ineffective assistance, we must first find proof of prosecutorial misconduct. As noted in *State v. Graves*,

668 N.W.2d 860, 874 (Iowa 2003), a prosecutor is entitled to “some latitude” during closing arguments in analyzing the evidence admitted at trial. A prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence, but may not suggest that the jury decide the case on any ground other than the weight of the evidence introduced at trial. *Id.* In addition, a prosecutor is not allowed to make inflammatory or prejudicial statements regarding a defendant in a criminal action. *Id.* These rules ensure the case is decided solely on the evidence.

However, even if prosecutorial misconduct occurred, “it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial.” *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003); *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). Ordinarily, a finding of prejudice results from persistent efforts to inject prejudicial matter before the jury. *Webb*, 244 N.W.2d at 333. A prosecutor’s misconduct will not require a new trial unless the conduct was so prejudicial as to deprive the defendant a fair trial. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989).

O’Geary argues that the assistant county attorney committed prosecutorial misconduct when he (1) commented on the truthfulness of a defense witness, (2) made conclusory statements thereby offering his own testimony on the case, (3) created evidence of a “wall strike,” and (4) asked O’Geary whether he had burned Mercedes with a cigarette.

i. Comments on Truthfulness.

The Iowa Supreme Court has held “it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments.” *Graves*, 668 N.W.2d at 876.

O’Geary claims the prosecutor committed misconduct by commenting on the truthfulness and credibility of one of his expert witnesses. The State responds that defense counsel’s closing statement invited the prosecutor’s statements, and therefore these statements did not deprive O’Geary of a fair trial.

The witness at issue was Dr. John Plunkett, a forensic pathologist called to testify for the defense. The prosecution vigorously cross-examined Dr. Plunkett during trial. Throughout closing argument, O’Geary’s trial counsel tried to convince the jury that O’Geary’s expert witnesses were superior to the State’s expert witnesses. In doing so, trial counsel made the following statement about the expert witnesses for the defense:

I invite you to carefully look at [the] vitae of Dr. Plunkett and Dr. Stephens. Are these men qualified? Are they simply people who will come to court and for money give any opinion asked of them? If that’s so, then say it. Are they liars? If that’s so, then say it. Are they unqualified? If that’s so, then say it. But that’s not what these CV’s show.

In his rebuttal closing argument, the prosecutor responded to this challenge with the following statements:

[Trial counsel] at one point said, “Say it,” and I’m sure that was directed at me. Well, I will say it. John Plunkett is unprincipled, he’s unreliable, he’s not qualified, he’s a hack, he sells his testimony for a price, he’s the worst medical doctor witness you could imagine because he’ll say whatever it takes.

The prosecutor also described the views propounded by Dr. Plunkett in a separate study as “crackpot.” Finally, the prosecutor stated:

Would you rely on someone who said some of the things that that man said in the courtroom? . . . [T]he man who can't remember one of the former cases that have happened in the last two years in which he's testified, he couldn't remember those cases. What about the Bourgoyne case? Oh, I don't remember that. Sierra Everts, you know? No, I don't remember that. Well, you know Dr. Randall; I know Dr. Randall. You talked to him about this case; no, I don't remember that. Or the Beard case or any of the other cases I asked him about, he didn't remember them. He's lying. He didn't want to be put on the spot about his inconsistent testimony in other trials.

Obviously, these statements by the prosecutor were unprofessional and not becoming of an officer of the court. However, even if we assume the prosecutor committed misconduct, we still must find this misconduct precluded O'Geary from receiving a fair trial on the issues. In determining whether prosecutorial misconduct resulted in prejudice to the defendant's right to a fair trial, we consider several factors within the context of the entire trial. *Graves*, 668 N.W.2d at 869. These factors include (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 improper conduct. *Id.*

Based on these factors and our de novo review of the record, we conclude the defendant was not denied a fair trial. See *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1, 10 (1985) (stating “statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial”).

First, trial counsel's closing argument invited the prosecution to attack the truthfulness of Dr. Plunkett. Trial counsel made a tactical decision to pit the credibility of the State's expert witnesses against the credibility of the defense's expert witnesses. Trial counsel artfully crafted his closing argument so as to suggest that the prosecution had to either "say" that Dr. Plunkett sells his opinion for money or accept that Dr. Plunkett did not do so. In the same fashion, he invited the prosecution to "say" that Dr. Plunkett was a liar or "say" that he was unqualified. Rather than ignore these challenges and thereby imply to the jury that there was no reason to doubt the credibility of O'Geary's expert witnesses, the prosecution chose to directly answer trial counsel's challenge.

Second, the jury was instructed that statements, arguments, questions, and comments by the attorneys do not constitute evidence in this case.

Third, the comments made by the prosecutor were not so disparaging or pervasive as to prejudice his defense, particularly when viewed in light of the substantial evidence of his guilt. As noted above, the State's case against O'Geary was strong. There was abundant expert testimony to prove Mercedes's injuries were inflicted and not accidental. This, when coupled with O'Geary's prior physical abuse of Mercedes and the false statements he gave to investigators, supports the inferences of guilt.

Finally, we cannot discount the inconsistencies between the State's evidence and O'Geary's theory of how Mercedes may have received these injuries by accident. Under O'Geary's theory, as supported by Dr. Plunkett's testimony, Mercedes could have suffered these head injuries—the worst injuries one neurosurgeon had ever seen—if she fell down a flight of stairs. Despite

these massive head injuries, this theory required the jury to conclude that Mercedes silently got up, walked back to her room, and climbed back in her crib.

We cannot conclude the prosecutor's statements, when taken in context, swayed the jury to convict O'Geary on evidence outside the record and outside the instructions. Because he has not established that the exclusion of these disputed statements would lead to a reasonable probability of a different outcome, this claim must fail.

ii. Conclusory Statements by the Prosecution

O'Geary claims the prosecutor's statement in closing argument that Mercedes's fatal head injuries were inflicted, rather than accidental, constituted misconduct because it was the prosecutor's "own testimony." We find this claim meritless. O'Geary was charged with first-degree murder on the basis that the fatal injuries to Mercedes were inflicted by O'Geary. Testimony from multiple expert witnesses supported this charge. One expert witness testified this was "obviously a case of non-accidental trauma." The prosecutor had an evidentiary basis for this statement. O'Geary's trial counsel was not ineffective for failing to object. See *Graves*, 668 N.W.2d at 874 ("[A] prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence.").

iii. "Failing to Challenge the Prosecution's Creation of Evidence of a Wall Strike"

O'Geary claims the prosecution "created" evidence that O'Geary inflicted the fatal injuries by striking Mercedes's head against a living room wall. Furthermore, he claims his trial counsel was ineffective because he did not challenge the prosecution's "unethical attempt to create evidence." Upon our de

novo review of the record, we find nothing to support O'Geary's claim that the prosecution tried to create such evidence.

iv. Inflammatory Question

O'Geary claims his trial counsel and appellate counsel were ineffective in failing to object to the last question in the following exchange between O'Geary and the prosecutor:

Q. Isn't it true that a number of bad things happened to [Mercedes] while you were alone with her? A. Yes.

Q. For instance, the burn on her left hand, didn't that happen while you were alone with [her]? A. Yes.

Q. And you told [Jessica] that it was her grabbing a hot grate or something on the stove? A. In the stove, yes.

Q. Did you ever use a cigarette to burn her? A. No, I did not.

This one question was one of many questions asked in the midst of a long and arduous trial. In light of the evidence that O'Geary abused Mercedes by biting her hard enough to leave impressions of his teeth on her skin and spanking her hard enough to leave welts on her buttocks, and the fact that O'Geary had the opportunity to explain the burn, we find it highly unlikely this question had a significant prejudicial impact on this case. Accordingly, O'Geary has failed to prove that, but for his trial counsel's failure to lodge an objection to this question, the result of the trial would have been different. We also find his appellate counsel was not ineffective for failing to properly raise this issue on direct appeal.

7. Failure to Request a Mistrial

O'Geary claims his rights under the Fifth and Sixth Amendments were violated during a line of questioning between the prosecutor and Detective Slezak and a line of questioning between the prosecutor and Detective Choate.

O'Geary claims he was denied effective assistance of counsel because his trial counsel only asked the court for a cautionary instruction to the jury, rather than a mistrial.

A review of the side bar conversation between the court and the two parties reveals that trial counsel made a strategic decision to ask for a cautionary instruction to the jury, rather than a mistrial. Trial counsel specifically informed the district court he was not asking for a mistrial because he had received rulings that he believed were favorable to the defense.² During the postconviction hearing, trial counsel reiterated that he made the strategic decision not to ask for a mistrial because he wanted the trial to go forward under those favorable rulings and he did not want to jeopardize further favorable rulings that he anticipated he might receive from this judge.

“When counsel makes a reasonable tactical decision, this court will not engage in second-guessing.” *Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa Ct. App. 1989). Trial counsel is in a unique position to sense how a case is progressing for his or her client, evaluate the importance of certain rulings from the court, and observe the jury's reactions to the evidence. O'Geary's trial counsel did not want a mistrial in this case because he did not believe it was in his client's best interests to start over under new, and perhaps less favorable, circumstances. Instead, he was satisfied the court's timely instruction to the jury

² Trial counsel's successful motion in limine kept the jury from hearing evidence that Mercedes had marijuana residue in her urine when she died and that O'Geary had allegedly (1) given Mercedes marijuana, (2) blown marijuana smoke in her face, (3) told Mercedes to give him “tongue,” (4) sold methamphetamine, (5) consumed methamphetamine in his home at least two days before the incident, and (6) physically and sexually abused a former girlfriend. The court had also granted O'Geary's motion to suppress an audiotape that Jessica had secretly made while talking to O'Geary.

was sufficient to cure any damage done by the statements. We find this was a reasonable tactical decision in this case. See *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986) (“Generally, trial court’s quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice.”). Accordingly, we find O’Geary has failed to prove his attorney performed below the standard demanded of a reasonably competent attorney.

8. Failure to Call an Expert Biomechanical Engineer

O’Geary claims his trial counsel was ineffective because he did not obtain the testimony of a biomechanical engineer to aid his defense.

Trial counsel retained two forensic pathologists to testify that Mercedes’s injuries could have been caused by a fall. Now he claims these witnesses were inadequate because a biomechanical engineer was “essential” to prove his defense. The postconviction court rejected this claim, stating

All this expert would add is that it was *possible* that the death was the result of a fall. Other than the area of expertise, the testimony of a biomechanical engineer would have been essentially the same as Dr. Plunkett who did testify as an expert in the trial. . . .

The decision made by [trial counsel] with respect to the hiring of an expert biomechanical engineer is a tactical decision and does not show that the attorney performed below the standard demanded of a reasonably competent attorney.

We accept the district court’s reasoning as our own because “[c]ounsel’s duty to investigate and prepare a defense is not limitless and does not require counsel to pursue each possible witness and delve into every line of inquiry.” *Heaton v. State*, 420 N.W.2d 429, 431 (Iowa 1988).

We also find O'Geary has failed to prove sufficient prejudice for this ineffective assistance claim. O'Geary's biomechanical engineer testified at the postconviction hearing, and the extent of this testimony, as noted in O'Geary's appellate brief, was that "an environment was present for an accidental injury" and "scientifically that an accidental event could not be ruled out." Even if trial counsel had called this biomechanical engineer to testify at trial, we find there is not a reasonable probability this testimony would have altered the jury's verdict.

B. Newly Discovered Evidence

O'Geary contends the postconviction court acted improperly in refusing to grant his motion for a new trial on the basis of alleged new evidence. We apply an abuse of discretion standard when reviewing the district court's ruling on motions for new trial based on newly discovered evidence. *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997); *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996). In general, motions for new trial on the basis of newly discovered evidence are looked upon with disfavor and granted sparingly. *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994).

To demonstrate that newly discovered evidence warrants a new trial, O'Geary must show the evidence (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative and impeaching, and (4) would probably have changed the result of the trial. *Id.*

O'Geary contends there is new evidence that Jessica Blough received favorable treatment for her role in this case. The alleged new evidence was that

Jessica's bond in her separate case was reduced because the prosecution reduced one charge against her from a class B felony to a class C felony.³

While O'Geary contends this evidence was newly discovered because it was not known until after the verdict, he fails to present a persuasive reason why this evidence could not have been discovered prior to trial. The record indicates Jessica's bond reduction occurred nearly six months before O'Geary's trial. O'Geary's trial counsel was aware of the charges against Jessica, and he had access to her court file. There is no reason this information could not have been discovered prior to trial.

Because O'Geary failed to prove why this evidence could not have been discovered prior to his trial, the postconviction court did not abuse its discretion when it denied his request for a new trial.

C. Material Facts Not Previously Presented or Heard Requires Vacation of the Conviction of Sentence in the Interest of Justice

Iowa Code section 822.2(4) authorizes postconviction relief when "There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

O'Geary asks this court to reverse his conviction because, two years after his conviction, the Eighth Circuit Court of Appeals adopted a new standard of admissibility for medical opinion in federal court. *See Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202 (8th Cir. 2000). O'Geary asks this court to adopt this new

³ The State points out that Jessica was originally charged with possession of methamphetamine but the charge was later amended to the lesser charge of possession of amphetamine.

standard of admissibility and reverse his conviction so he may be tried under this new standard. We find no reason for reversal here.

IV. Conclusion

Having considered all arguments claimed on appeal, whether or not specifically addressed in this opinion, we affirm the district court's decision denying O'Geary's petition for postconviction relief.

AFFIRMED.