

IN THE COURT OF APPEALS OF IOWA

No. 8-069 / 07-0653
Filed February 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIE JAMES HAYES,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Timothy T. Jarman, District Associate Judge.

Willie James Hayes appeals the district court's judgment and sentence for driving while barred and driving while revoked. **CONDITIONALLY AFFIRMED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Patrick Jennings, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Willie James Hayes appeals the district court's judgment and sentence for driving while barred and driving while revoked. He argues (1) trial counsel was ineffective in failing to object to the prosecutor's "comments on the exercise of [his] right to remain silent" and (2) the district court "applied an incorrect standard in overruling [his] motion for new trial."

On the first issue, Hayes points to the following exchange between the prosecutor and a police officer:

Q. Did [Hayes] say anything regarding these charges when he was arrested? A. No.

Q. Did he say, hey, I wasn't the driver? A. No.

Q. Did he tell anybody who was the driver? A. No.

Q. He remained completely silent? A. Yes.

Hayes also points to the following comments by the prosecutor during his closing argument:

Sometimes in a trial the . . . most interesting points are the points that are never addressed or things that were never said by the defendant. When he's arrested, does he say, "Hey, that was my buddy driving, not me?" No, he doesn't. He never says a word. He's combative, but he never says a word. He never says, "I wasn't driving; it was my friend that day."

"We normally preserve an ineffective-assistance-of-counsel claim for a postconviction relief proceeding where preserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim." *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We do so here.

Turning to the second issue, the State concedes the district court used a "sufficiency of the evidence" standard instead of a "weight of the evidence"

standard in ruling on Hayes's new trial motion. The State further concedes "[t]his is not the correct standard." See *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998). We conditionally affirm Hayes's judgment and sentence and remand for the district court to consider Hayes's new trial motion using the weight of the evidence standard.

CONDITIONALLY AFFIRMED AND REMANDED.