IN THE COURT OF APPEALS OF IOWA

No. 9-1001 / 08-1764
Filed March 24, 2010

TYLER L. REYNOLDS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

A postconviction relief applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

John S. Moeller, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill Esteves, Assistant County Attorney, for appellee State.

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

VAITHESWARAN, J.

Tyler Reynolds appeals the district court's denial of his application for postconviction relief.

I. Background Proceedings

A jury found Reynolds guilty of second-degree kidnapping, first-degree robbery, first-degree burglary, first-degree theft, going armed with intent, assault while participating in a felony, and conspiracy to commit various crimes. This court affirmed his convictions on direct appeal. *State v. Reynolds*, No. 01-1067 (Iowa Ct. App. Dec. 11, 2002).

Reynolds subsequently filed an application for postconviction relief, raising ineffective-assistance-of-counsel claims and a claim of prosecutorial misconduct. The district court granted the State's motion for summary judgment. On appeal, this court affirmed the district court's dismissal of Reynolds's claims,

> except those that his trial attorney failed to (1) preserve error on the claim of prosecutorial misconduct, (2) failed to object to the reference to the Holyfield statement and obtain a recording of the interview, and (3) failed to strike the juror from the panel who knew the police officer witness.

Reynolds v. State, No. 06-1272, at *5 (Iowa Ct. App. Aug. 8, 2007). We remanded these claims for an evidentiary hearing and the issuance of findings and conclusions. *Id.* On remand, the district court ruled in favor of the State. Reynolds appealed.

II. Analysis

Reynolds contends his trial attorney was ineffective in failing to (1) object to instances of what he characterizes as prosecutorial misconduct, (2) impeach a witness with her prior inconsistent statement, (3) object to a police officer's

opinion testimony and request a recording with which to impeach him, and (4) challenge a juror for cause. To prevail, he must show that trial counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

A. Prosecutorial Misconduct

Reynolds first contends his trial attorney should have objected to the prosecutor's questions in its case-in-chief that elicited information about his prior criminal history. He appears to concede, however, that the prosecutor could have, and indeed did, elicit the same information on cross-examination of him. For this reason, we conclude Reynolds did not establish *Strickland* prejudice. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) ("[T]he withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffectiveness of counsel.").

Reynolds next contends his trial attorney was ineffective in failing to object to the prosecutor's prompting of a State witness to assert her Fifth Amendment privilege against self-incrimination. *Cf. Namet v. U.S.*, 373 U.S. 179, 186–87, 83 S. Ct. 1151, 1154–55, 10 L. Ed. 2d 278, 283–84 (1963) (citing case law suggesting use of privilege by State to bolster its case might be prosecutorial misconduct). He concedes, however, that the witness asserted this privilege outside the presence of the jury. This fact distinguishes the present scenario from *State v. Allen*, 224 N.W.2d 237 (Iowa 1974), in which the court found reversible error under similar facts. *Allen*, 224 N.W.2d at 240 ("It is improper for a prosecutor to require a witness to claim his privilege against self-incrimination

in the presence of the jury when, as in this case, the prosecutor knows or has reason to anticipate the witness will assert it." (emphasis added)). Accordingly, we conclude trial counsel did not breach an essential duty in failing to object to the prosecutor's tactics.

B. Prior Inconsistent Statements

Reynolds next claims that his trial attorney was ineffective in failing to impeach a witness with her prior inconsistent deposition testimony. This claim is a variant of a claim that the court rejected on direct appeal and on appeal from the original summary ruling on Reynolds's postconviction relief application. *Reynolds v. State*, No. 06-1272, at *4; *State v. Reynolds*, No. 01-1067, at *2. Although Reynolds couched the omission somewhat differently in the previous appeals, the key question was the same: whether defense counsel was ineffective in his efforts to impeach the witness. On this question, the court concluded that "Reynolds suffered no prejudice" because the issue "related to the collateral matter of impeachment." *Reynolds*, No. 01-1067, at *2. That conclusion is dispositive.

C. Opinion Testimony and Request for Recording

Reynolds also claims that his trial attorney was ineffective in failing to raise a proper objection to a police officer's rendition of Reynolds's statements to him "as an impermissible opinion." He also contends counsel "should have sought to impeach the testimony with a recording of the interview which . . . would have shown he never made the statement."

The officer testified that Reynolds said "he's going to take his chances; and if he gets the right jury, he's going to see if he can pull a Holyfield." The

officer proceeded to explain what the "Holyfield" reference meant to him, stating that Evander Holyfield was a boxer who fought Lennox Lewis and "Holyfield got to retain his belt in a draw with Lennox Lewis even though boxing professionals, in general, believed Lennox Lewis won the fight."

"A witness's impressions of the intended meaning of the out-of-court remarks of another are generally inadmissible." *State v. Seehan*, 258 N.W.2d 374, 378–79 (Iowa 1977). In certain cases though, this evidence may be deemed non-prejudicial. *Id.* at 379. We believe that is the case here because as in *Seehan*, "[t]he witness's interpretation of defendant's remark seems elementary and obvious." *Id.* While we recognize that boxing terminology might not have been familiar to an average juror, the import of the reference was clear when read in context. As the court explained in *Seehan*, "It seems highly unlikely any juror's understanding of defendant's remark was altered or in any way affected by the witness's explanation of the remark." *Id.* Because the admission of this statement would have been non-prejudicial had counsel objected to it and had his objection been overruled, trial counsel did not breach an essential duty in failing to raise a proper objection to it.

As for Reynolds's related contention that counsel should have obtained the recording of the police interview with him to show that the "Holyfield" comment was never made, the officer testified that his dictated notes, prepared after the interview, contained a reference to the "Holyfield" comment. For that reason, this ineffective assistance claim fails.

D. Juror

Finally, Reynolds argues that his trial counsel was ineffective in failing to challenge a juror for cause after he stated that he knew an officer with the same name as the officer who testified about the Holyfield comment. We find no breach in counsel's failure to challenge this juror for cause because even if the officer who testified was the same officer the juror knew, a fact which is not clear from the record, the juror stated his contact with the officer occurred eight years earlier and he could judge the officer's credibility as he would anyone else's. *See State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990) ("[T]he correct standard is 'whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.'" (quoting *State v. Johnson*, 318 N.W.2d 417, 421–22 (1982))).

We affirm the district court's denial of Reynolds's postconviction relief application.

AFFIRMED.