

IN THE COURT OF APPEALS OF IOWA

No. 9-596 / 08-1947
Filed August 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM B. ARISTANDO SANTACRUZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Crawford County, Duane E. Hoffmeyer, Judge.

Defendant appeals his conviction for sexual abuse in the third degree.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Vicki Ryan and Michael Mundt, County Attorneys, and Susan Larson Christensen and Roger Knee, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Defendant, William B. Aristando Santacruz, appeals from his conviction of sexual abuse in the third degree in violation of Iowa Code section 709.4(1) (2007). He contends he received ineffective assistance of counsel when his attorney failed to object to prosecutorial misconduct. We affirm.

I. BACKGROUND. On the evening of November 23, 2007, Jessica Magana reported to police that she had been sexually assaulted and identified the defendant, a friend of Jessica's family, as the perpetrator. The defendant admitted to having sex with Jessica but contended it was consensual. At trial he testified that Jessica scratched his face and arms during the encounter but she did not inflict them out of anger. On cross-examination, the prosecutor asked,

Q. And Jessica did put that scratch on your face, didn't she? This is a yes or no. A. Well, I can't say. Like I said before, when you're in the middle of a sex act, you—your mind is not clear thinking. Neither one of the two of us were thinking clearly.

Q. Let me ask you this, Mr. Santacruz: Jessica testified that she scratched your face that night. Are you saying that that was true or untrue testimony? A. Well, like I say, she didn't do it to me trying to hurt me. When you're in the action of a sex act or relation, you grab each other. You grab things and things happen on your body that later you wonder where did that come from, and things happen that you don't know where or when it happened.

Q. So in—strike that. You're not denying Jessica's testimony that that scratch was put on your face by her? A. Well, like I said, I don't know how it came about. I didn't feel that she did it because she wasn't doing it because she was angry. It just—but yes, it did come from that act.

The defendant also testified that when officers asked the defendant to come to the police station to be interviewed about the incident, he was placed in handcuffs. To rebut this testimony, the prosecution called the officer that transported the defendant to the station and asked,

Q. Officer, if I were to tell you that there was testimony offered in this case that the defendant was placed in handcuffs as he was taken down to the police station, would you say that testimony was true or not true? A. That is not true.

A jury found the defendant guilty of sexual abuse in the third degree. On appeal the defendant contends these questions posed by the prosecutor were improper. The defendant argues he received ineffective assistance of counsel when his attorney failed to object to this alleged prosecutorial misconduct.

II. SCOPE OF REVIEW. We review claims of ineffective assistance of counsel de novo. *State v. Boggs*, 741 N.W.2d 492, 499 (Iowa 2007). Ineffective assistance of counsel claims are generally reserved for postconviction relief. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). We can resolve the claim on direct appeal however when presented with an adequate record. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). To succeed on his claim, the defendant “must prove by a preponderance of the evidence that (1) his counsel failed to perform an essential duty, and (2) prejudice resulted.” *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (quoting *Tejeda*, 677 N.W.2d at 754).

III. PROSECUTORIAL MISCONDUCT. To establish a claim of prosecutorial misconduct, a defendant must prove that misconduct occurred and that it was so prejudicial that it deprived the defendant of a fair trial. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003); see *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002); *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). The resulting prejudice entitles the defendant to a new trial, not the misconduct itself. *State v. Greene*, 592 N.W.2d 24, 31 (Iowa 1999). In the context of an ineffective assistance of counsel claim based on failure to object to prosecutorial

misconduct, we first “consider whether the prosecutor was guilty of misconduct in the particulars identified by [the defendant] and whether the record shows [the defendant] was prejudiced, i.e., denied a fair trial.” *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). If the record is adequate enough to show that either element is lacking as a matter of law, we will affirm the conviction without preserving the claim for postconviction relief. *Id.* at 870. If the record establishes both elements of prosecutorial misconduct, we then evaluate counsel’s failure to object. *Id.* We determine if the attorney performed within the range of normal competency, and if not, whether there is a reasonable probability the outcome of the defendant’s trial would have been different had counsel objected or moved for a mistrial based on the prosecutor’s misconduct. *Id.* We need not evaluate counsel’s performance prior to analyzing the prejudice element. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). “If sufficient prejudice is not shown, we need not address whether counsel breached an essential duty.” *Id.*

In *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003), the Supreme Court considered whether a prosecutor commits misconduct by asking the defendant whether another witness lied. It found this tactic “incompatible with the duties of a prosecutor.” *Graves*, 668 N.W.2d at 873. It ruled

that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments. Notwithstanding this prohibition, a prosecutor is still free “to craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable.”

Id. at 876 (quoting *State v. Davis*, 61 P.3d 701, 710-11 (Kan. 2003)). Although the prosecutor in this case did not specifically ask the defendant whether other witnesses lied, the prosecutor did ask the defendant and an officer whether they believed certain testimony given by other witnesses was true. This questioning could be viewed as an attempt to characterize the defendant as a liar. Inquiring about another witness's veracity is misconduct under any circumstances. *State v. Carey*, 709 N.W.2d 547, 552 (Iowa 2006) ("In *Graves*, we held that it is misconduct, under any circumstances, for a prosecutor to ask a witness to comment on the veracity of another witness.")

Even if prosecutorial misconduct is established, however, in an ineffective assistance of counsel claim the defendant is only entitled to a new trial if he was prejudiced by his attorney's failure to object to the improper questions. See *Id.* at 559.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . [Therefore], any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffectiveness under the Constitution.

Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066-67, 80 L. Ed. 2d 674, 696 (1984)). The defendant is required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Graves*, 668 N.W.2d at 882 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). In making this determination we consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect

was pervasive or isolated and trial.” *Id.* at 883 (quoting *Strickland*, 466 U.S. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698).

Applying these factors to the circumstances of this case, we find the misconduct did not result in prejudice. The misconduct was not severe or pervasive. The prosecutor did not directly call the defendant a liar or ask the defendant if other witnesses were lying. The misconduct was not pervasive and instead, was limited to isolated questions. The defendant does not claim the misconduct spread throughout the trial or during closing arguments, as occurred in *Graves*. See *id.*, 668 N.W.2d at 880-81 (noting that the prosecutor’s misconduct “was not isolated, but rather became a central theme of the government’s prosecution”).

The defendant points out that the credibility of the witnesses was the central issue at trial and his attorney’s failure to object to the prosecutor’s questions affected the jury’s credibility findings. Both the defendant and Jessica agreed that a sex act occurred but the defendant claimed it was consensual whereas Jessica claimed it happened against her will. Therefore, as the defendant argues, the prosecution’s questioning witnesses about whether other testimony was true or false prejudiced the defendant by characterizing him as a liar. We agree that the prosecution’s misconduct did bear on an important issue in the case. However, the impact of the prosecution’s misconduct on the central issue of credibility appears minimal since they were isolated incidents. See *Carey*, 709 N.W.2d at 559 (finding no prejudice caused by the prosecution’s “was he lying” question and by misstating defendant’s testimony because they were

isolated incidents and had minimal impact on the issue of credibility). We find the attorney's failure to object to the improper questions had minimal impact on the credibility issue.

"The most important factor under the test for prejudice is the strength of the State's case." *Id.* Although the evidence against the defendant was not overwhelming, the prosecution did have a strong case. There were multiple witnesses and additional evidence that supported Jessica's claim that she had been sexually assaulted. She called 911 shortly after the incident and the call was admitted into evidence. The responding police officer testified that others came to the police station to also report that their friend, Jessica, had been raped. The officer described Jessica's shaken state and recounted what Jessica claimed had transpired. A nurse who treated Jessica the night of the incident also testified about Jessica being visibly upset. Jessica's testimony that she scratched the defendant in an attempt to protect herself was also supported in the record. The officer corroborated her testimony, the scrapings from Jessica's fingernails matched the defendant's DNA, and scratches were found on the defendant's face and arms. Some of the defendant's own statements support Jessica's claim of assault. The defendant testified that he knew why officers came to his house and wanted to interview him, even before the officers explained that Jessica had reported a sexual assault. He also admitted that Jessica told him to stop, but stated she was not angry and did not yell at him.

Although the prosecution asked improper questions and committed misconduct, we find counsel's failure to object to the isolated questions did not

cause the defendant prejudice. There is not a reasonable probability that the jury was misled or inflamed by the prosecutor's questions or found the defendant guilty for reasons other than those found in the evidence. Given that the defendant suffered no prejudice from any prosecutorial misconduct, his ineffective assistance of counsel claim fails and we affirm his conviction.

AFFIRMED.