IN THE COURT OF APPEALS OF IOWA

No. 5-202 94-106

FILED
JUN 27 1995
CLERK SUPREME COURT

EDWARD ANTHONY RONE,
Appellant.

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Rone challenges the order denying his petition for postconviction relief from his convictions for first-degree murder and first-degree burglary. **AFFIRMED.**

David A. Poore, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Richard Crowl, County Attorney, and Chris Wilson, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., Huitink, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Edward Anthony Rone was convicted, following a jury trial, of first-degree murder and first-degree burglary. The court sentenced him to up to twenty-five years on the burglary conviction and life imprisonment on the murder conviction. His convictions and sentences were affirmed on direct appeal. *State v. Rone*, No. 90-645 (Iowa App. May 29, 1991).

Rone then filed this postconviction relief action. Rone claimed there are four categories of prosecutorial misconduct which took place during the prosecutor's closing argument. He claimed the prosecutor improperly: (1) appealed to the jury's sympathy and prejudice by making emotional comments; (2) commented on evidence outside the record; (3) commented on post-arrest silence; and (4) destroyed the credibility and effectiveness of defense counsel. Rone claimed his trial counsel rendered ineffective assistance by failing to preserve error on these prosecutorial misconduct claims. The district court denied the application. Rone appeals.

While there may be some question as to whether Rone waived his arguments raised on this appeal, we choose to address the merits of his arguments.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

All of Rone's contentions center around alleged acts of prosecutorial misconduct. To establish prosecutorial misconduct, a defendant must show not only that an improper statement was made, but also it caused prejudice to the defense. *State v. Bishop*, 387 N.W.2d 554, 561 (Iowa 1986). If Rone is unable to show there was prosecutorial misconduct, then his claims of ineffective assistance of counsel must also fail since his trial counsel cannot be faulted for failing to object to acts which do not constitute misconduct. We find all of Rone's claims must fail.

Rone's claims of prosecutorial misconduct through the use of emotional comments center around the prosecutor's use of the words "sad," "pathetic," and "grim." Rone also claims the prosecutor improperly used the "golden rule" argument where he asked the jurors to put themselves in the place of the victim. While the words sad, pathetic, and grim were poorly chosen, we do not believe the usage of these words rises to the level of misconduct in this particular case. In addition, we find the prosecutor's golden rule argument to be fairly responsive to the defense counsel's earlier argument urging the jury to place itself in the position of Rone. The argument was not misconduct in this case. *See State v. Thornton*, 498 N.W.2d 670, 676-77 (Iowa 1993).

Rone's claims of prosecutorial misconduct due to comments made on evidence outside the record refers to the prosecutor telling the jury fifty-one witnesses had been listed on the trial information, and the number of witnesses called at trial was substantially less. In his brief, Rone admits this comment was a prefatory remark and

not a substantial argument put forth by the prosecution. While this prefatory remark was certainly poorly chosen, we find the comment does not rise to the level of misconduct.

Rone also claims the prosecution improperly commented on Rone's alleged post-arrest silence. The challenged comment is as follows:

> And people say self-serving things. You're going to have to look at the circumstances. That's the most credible aspect of the case is what actually happened, not what he [Rone] says eleven months afterwards to this jury or what he tells the State's doctor ten months after the event or his own doctor six months after the event. My goodness, that gives him any number of months to -- to sort out in his own mind what he wants to present to the doctors and to a jury.

Rone contends these comments were in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), which held the silence of a defendant at the time of arrest may not be commented upon. We do not believe this passage is a comment on any alleged silence at the time of Rone's arrest. These comments were not misconduct.

Rone's final claim of prosecutorial misconduct involves the prosecutor allegedly destroying the credibility and effectiveness of the defense attorney. We believe all of the comments objected to by Rone were either permissible comments on the evidence or reasonable inferences from the evidence. *See State v. Conner*, 241 N.W.2d 447, 456 (Iowa 1976). None of the comments were improper.

We have considered all of the claims presented by Rone and find none of them to rise to the level of prosecutorial misconduct. Since there was no

prosecutorial misconduct. we conclude Rone's claims of ineffective assistance of counsel must fail. We affirm the decision of the district court. The State's pending motion to strike is denied.

AFFIRMED.