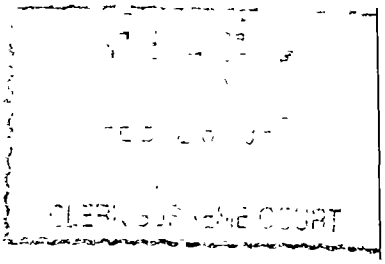
IN THE COURT OF APPEALS OF IOWA



No. 6-755 / 95-0681

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LEWIS EUGENE ANDERSON III,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Washington County, Dan F. Morrison, Judge.

This is an appeal from the denial of an application for postconviction relief.

AFFIRMED.

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Gerald N. Partridge, County Attorney, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

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STREIT, J.

Applicant appeals from the denial of an application for postconviction relief. He asserts four arguments, each of which is supported by several allegations of prosecutorial misconduct or ineffective assistance of counsel.

Lewis Eugene Anderson III, was convicted in 1988 for the first-degree murder of seventy-three-year-old widow Ruth Patterson. He was also found guilty of first-degree burglary. On appeal, the court of appeals reversed and remanded the case for retrial. Upon further review, the supreme court vacated the decision of the court of appeals and affirmed the judgment of the district court. *State v. Anderson*, 448 N.W.2d 32 (Iowa 1989). The Iowa Supreme Court described the evidence against Anderson as "[o]verwhelming" and "ironclad." *Id.* at 33-34.

Anderson filed an application for postconviction relief. A ruling on his application was filed on December 21, 1994. The court found Anderson had advanced ten reasons in support of his application, six of which had previously been addressed by the Iowa Supreme Court. The court reviewed the remaining four reasons and denied the application.

Anderson appeals. He argues: (1) a pattern of official and prosecutorial misconduct before and throughout the trial denied him a fair trial; (2) his trial counsel were rendered ineffective by official misconduct; (3) his attorneys' failure to perform essential duties rendered them ineffective at trial and on appeal; and (4) under the

totality of the circumstances he was denied a fair trial and the effective assistance of counsel.

Upon review of the trial transcripts, videotape, accompanying exhibits, and the record of the postconviction court, we affirm the postconviction court's denial of Anderson's application seeking postconviction relief.

I. Prosecutorial Misconduct. Anderson first contends a pattern of official and prosecutorial misconduct before and throughout the trial denied him a fair trial. In support of this argument he contends: (1) he was denied due process and his right to counsel when the county attorney, sheriff, and jailers failed to inform him of his counsel's presence when he was undergoing questioning; (2) exculpatory evidence was deliberately withheld from his counsel; (3) the prosecutor's "contrived theatrics" during the trial should have resulted in a mistrial; and (4) the prosecutor committed misconduct in handling misconduct by a reserve deputy in discussing the case with one of the jurors.

To be entitled to postconviction relief, Anderson must prove, by a preponderance of the evidence: (1) that the prosecutor was guilty of misconduct; and (2) that he was prejudiced thereby. *Gordon v. State*, 450 N.W.2d 265, 268 (Iowa App. 1991). He must prove more than a mere possibility of prejudice. He must show that the misconduct "worked to his . . . actual and substantial disadvantage . . . ." *Id.*

Since his claim of prosecutorial misconduct involves constitutional challenges, we review de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

A. Right to Counsel. Anderson claims the sheriff's office and county attorney intentionally interfered with his fifth amendment right to counsel. Anderson asserts that while he was being interrogated by DCI agents for the fourth time, the sheriff's office intentionally gave his counsel the runaround because they did not tell his counsel he was in the basement of the sheriff's office and did not let him know that counsel was there to represent him. Anderson argues his counsel was intentionally kept from him.

Anderson was interviewed four times before he was charged with first-degree murder. The fourth interview took place in the basement of the sheriff's office by DCI agents. Anderson had been informed of his *Miranda* rights and waived those rights in the previous interview conducted earlier that morning at Anderson's house. The agents began the fourth interview by reminding Anderson of those rights, which he acknowledged by nodding his head. Affirmative conduct indicative of voluntary, intentional and knowing relinquishment of the right to counsel may constitute a waiver. *Fryer v. State*, 325 N.W.2d 400, 410 (Iowa 1982). Anderson was not under arrest.

While Anderson was being interviewed, his father had contacted counsel to represent him. When counsel arrived at the sheriff's office to represent Anderson, he

was unable to find him even after enlisting the help of County Attorney Partridge. After approximately two hours, counsel and Anderson met and then left the sheriff's office.

After reviewing the record, there is evidence sheriff's personnel gave counsel the runaround and kept Anderson from seeing the attorney, but there is no evidence the county attorney engaged in any of this activity. Anderson waived his right to have an attorney present under *Miranda*. Although we do not condone the ludicrous behavior of deceiving the attorney as to Anderson's whereabouts, the sheriff's personnel had no duty to inform Anderson that an attorney was there to represent him. *Moran v. Burbine*, 475 U.S. 412, 425-27, 106 S. Ct. 1135,1143, 89 L. Ed. 2d 410, 423-25 (1986).[1] *Miranda* requires the suspect be told he has a right to counsel. Anderson never asked to see an attorney.

Furthermore, the information obtained during the fourth interview was not prejudicial. The prosecution used the information received during the fourth

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[1] The *Moran* Court stated:

> The purpose of the Miranda warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney--conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation--would ignore both Miranda's mission and its only source of legitimacy.

Moran, 475 U.S. 412 at 425-27.

interview on cross-examination to impeach Anderson as to his whereabouts and activities on the night of the crime.[2] The information was just one of the many different stories Anderson gave the police in response to the question regarding his whereabouts the night or early morning of the murder. We find such evidence was cumulative and not prejudicial. Also, such evidence, even if received in violation of *Miranda*, may be used for impeachment purposes during cross examination. *Harris v. New York*, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1, 4 (1971); *State v. Donelson*, 302 N.W.2d 125, 132 (Iowa 1981). Once the defendant takes the witness stand, he opens the door to attack on his credibility. *Id.*; *State v. Bauer*, 324 N.W.2d 320, 323 (Iowa 1982).

We find the remaining issues of alleged prosecutorial misconduct to also be without merit.

B. Exculpatory Evidence. Anderson argues a pair of orange coveralls found in the trunk of his car with a footprint on the back were exculpatory evidence kept from him and his attorneys by the prosecutor until after trial. Anderson must show the suppressed evidence affected the outcome of the trial. *See Knox v. State*, 532 N.W.2d 149, 154 (Iowa App. 1995). There is no evidence the coveralls had any

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[2] Anderson changed his story each time the police interviewed him regarding his whereabouts on the night in question. At trial Anderson admitted the two stories he previously told the police were not true.

relation to the crime committed, thus we do not see how the coveralls could have affected the outcome.

C. Prosecutorial theatrics. Next, Anderson complains the prosecutor was trying to distract the jury during the trial--engaging in theatrical scene stealing during the climax of the defendant's case in chief. He claims the prosecutor purposely caused a distraction in the court room and somehow ruined the defendant's claim of innocence at the conclusion of direct examination when the prosecutor had the defendant's younger brother get up off the floor and sit in a seat.

The occurrence took place during a pause between direct and cross-examination. The prosecutor quietly conferred at defense table with defendant's family minister and defense counsel. He then directed the brother to an available seat in the courtroom. After reviewing the videotape we find there was simply no commotion or disturbance. The actions took place during a regular pause in the trial. There is no merit to the defendant's claim.

Anderson also claims the prosecutor engaged in theatrics when he handed a gun to Anderson on the stand, then said, "Don't point it at me." The Iowa Supreme Court has already determined that Anderson received a fair trial despite the occurrence of this incident. *State v. Anderson*, 448 N.W.2d at 33-34. We see no reason to depart from that decision.

D. Misconduct Toward the Jury. Finally, Anderson argues the prosecutor committed misconduct in handling an issue of misconduct toward the jury. The issue involved a remark made about the defendant's guilt or innocence by a uniformed reserve deputy who encountered a juror at a basketball game during a weekend recess in jury deliberations.[3]

Several weeks after the trial, County Attorney Partridge heard from the sheriff that an exchange had taken place between a deputy and a juror. Partridge immediately contacted the deputy and found out the name of the juror. Partridge then spoke with the juror to confirm there was an exchange and then called defense counsel to notify him of an issue of misconduct toward the jury. Defense counsel and Partridge then together attempted to obtain a judge so the juror could testify under oath. When they could not contact a judge, the juror's deposition was taken by a court reporter.

Anderson claims that the county attorney should have called defense counsel immediately before calling the reserve deputy and juror to confirm the sheriff's information. The Supreme Court found the juror was uninfluenced by the deputy's comments when the issue was presented on direct appeal on the claim of misconduct

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[3] The juror testified in a deposition that the deputy "kind of waved at me and I kind of waved back and kind of off-handedly he said, 'what's this not-guilty shit?'" The juror said he didn't understand and the deputy told him he would not want to be in the juror's position, then the juror ended the conversation and walked away.

of the deputy. The Court further stated the county attorney "responded responsibly" to the situation. *State v. Anderson*, 448 N.W.2d at 34. The prosecutor's actions after the trial was not misconduct and was not prejudicial to the defendant.

We find Anderson was not denied a fair trial based on prosecutorial misconduct.

II. Counsel Rendered Ineffective by Prosecutorial Misconduct. For his second argument Anderson maintains his trial counsel were rendered ineffective by prosecutorial misconduct. He claims his counsel could not properly object to a disruption created by the prosecutor at trial and deception on the part of law enforcement officials and/or the prosecutor denied him material evidence.

We have found no prosecutorial misconduct occurred, or if it did, it was without prejudice. We find applicant's second argument reiterates his first argument for prosecutorial misconduct only attaching a different label to his argument and is similarly without merit.

III. Ineffective Assistance of Counsel. Anderson asserts his trial and appellate counsel were ineffective in failing to properly present his suppression motion, in failing to interview all of the participants in the matter involving a deputy's discussion with a juror, in waiving closing argument, and in failing to appear for the appellate oral argument.

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In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To prevail on a claim of ineffective assistance, a postconviction applicant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced applicant. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The applicant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Court. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

A court need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *State v. Nebinger,* 412 N.W.2d 180, 192 (Iowa App. 1987). Even if Anderson could prove his counsel failed to perform an essential duty from one of the claims above, he has not shown there was prejudice.

> [T]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that

> ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. (quoting *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Court. 2052, 2070, 80 L. Ed. 2d 674, 700 (1984)).

The Supreme Court of Iowa has already described the evidence against Anderson as "[o]verwhelming" and "ironclad," *State v. Anderson*, 448 N.W.2d at 33-34. We find, after reviewing the record, the defendant has failed to show a reasonable probability that, but for claimed errors, the result of the proceeding would have been different. There was no prejudice by the conduct and, therefore, no ineffective assistance of counsel.

IV. Totality of the Circumstances. Anderson's final argument is that under the totality of the circumstances he was denied a fair trial and the effective assistance of counsel. He contends his counsel were ineffective in failing to pursue additional evidence which became available after trial. He argues that under the federal standard of a "probability of innocence" he should receive a new trial.

We have already found Anderson was not denied a fair trial based on prosecutorial misconduct. We have also found Anderson's counsel was not ineffective. The Supreme Court found the evidence against Anderson was "[o]verwhelming" and "ironclad." If we applied the federal "probability of innocence" standard, Anderson would have to show a constitutional error existed and

new reliable evidence not presented at trial supports this allegation. *See Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 860-62, 130 L. Ed. 2d 808, 827-29 (1995).

In reviewing the evidence offered by Anderson, we do not find the evidence supports these claims. Anderson also reasserts all of the issues he previously raised on direct appeal. Section 822.8 of the Iowa Code bars reconsideration of previously-litigated claims.

In summary, we have reviewed all of the record and find no merit to Anderson's contentions and no prejudice to his right to a fair trial. We affirm the trial court's denial of postconviction relief.

AFFIRMED.