IN THE COURT OF APPEALS OF IOWA

No. 1-341 / 00-0900
Filed December 12, 2001

FILED
DEC 12 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOBY RAY GRAGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith, Judge.

Toby Ray Grage appeals from his convictions for distribution of a controlled substance to a minor, delivery of a controlled substance, and providing alcohol to a minor. **REVERSED AND REMANDED FOR NEW TRIAL.**

Jane E. Rosien of Flander, Casper and Rosien, P.C., Winterset, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Richard R. Phillips, County Attorney, and Alan R. Ostergren, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

006620

MAHAN, J.

Toby Grage appeals from his convictions for distribution of a controlled substance to a minor, delivery of a controlled substance, and providing alcohol to a minor in violation of Iowa Code sections 124.406, 124.401(1)(d), and 123.47 (1999). Grage contends (1) delivery of a controlled substance is a lesser-included offense of distribution of a controlled substance to a minor and the trial court erred in not merging those sentences, (2) trial counsel was ineffective for failing to object to an opening statement and evidence concerning a fatal motor vehicle accident, (3) trial counsel was ineffective in failing to request a jury instruction which would require the State to prove Grage knew the recipient of the controlled substance was under eighteen years of age, and (4) trial counsel was ineffective in failing to move to suppress evidence seized from Grage's home. We reverse and remand for a new trial.

Background Facts and Proceedings. On July 13, 1999, Thomas Tuttle, Jeffrey Weaver, and Justin Unruh visited the home of Tuttle's cousin, Toby Grage. Tuttle was over eighteen years old, but Weaver was only seventeen. While at Grage's residence, Tuttle and Weaver smoked marijuana and consumed beer. The young men left Grage's home sometime between 5:30 and 6:30 p.m. At approximately 8:30 p.m. that night, Tuttle drove his truck through a stop sign and hit another vehicle, killing its occupant.[1] Weaver and Unruh were in a vehicle following Tuttle's truck and witnessed the collision.

---

[1] Laboratory tests showed the levels of alcohol and marijuana in Tuttle's blood to be low. No charges were filed against Grage or Tuttle for involuntary manslaughter or homicide by vehicle.

During the investigation of the accident, the young men were interviewed, and authorities learned they had consumed beer and smoked marijuana at Grage's residence earlier in the day. Grage consented to a search of his home, and officers found a bag of marijuana, a partially smoked marijuana cigarette, and three marijuana-smoking devices. Grage admitted to officers he had provided beer to Tuttle and Weaver but denied they had smoked marijuana at his home on that date.

Grage was charged with distribution of a controlled substance to a minor in violation of section 124.406 (Count I), delivery of a controlled substance in violation of section 124.401(1)(d) (Count II), and providing alcohol to a minor in violation of section 123.47 (Count III). A jury found Grage guilty on all counts, and he was sentenced to an indeterminate term not to exceed twenty-five years on Count I, six months on Count II, and one year on Count III, with the sentences to run concurrently.

Scope of Review. Grage claims he was denied effective assistance of counsel in several respects. Specifically, he alleges in his first claim that his counsel was ineffective for failing to exclude any statements or evidence concerning Tuttle's involvement in a fatal accident two to three hours after he left Grage's home.

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil,* 264 N.W.2d 293, 296 (Iowa

1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We conclude the record is adequate in this case to resolve the issue.

We review claims of ineffective assistance of counsel de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000).

The defendant bears the burden of demonstrating ineffective assistance of counsel by a preponderance of the evidence. *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa 2000); *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). The purpose of the effective assistance guarantee of the Sixth Amendment is "*simply to ensure that criminal defendants receive a fair trial.*" *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140, 148 (1988) (quoting *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694) (emphasis added). Defendants are entitled not only to counsel, but also to counsel that is "zealous and active." *Powell v. Alabama*, 287 U.S. 45, 58, 53 S. Ct. 55, 60, 77 L. Ed. 158, 165 (1932).

Prosecutorial Misconduct. In *State v. Blanks,* 479 N.W.2d 601, 603 (Iowa Ct. App. 1991), a defendant contended he was denied a fair trial because

his attorney failed to object to the prosecutor's prejudicial statements. Grage makes the same contention in the instant case. The State acknowledges, and we conclude, that a claim of ineffective assistance of counsel is an exception to the general rule of error preservation. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Thus, the fact that Grage did not raise the issue of prosecutorial misconduct at the trial level is of no import here.

We must first consider whether the prosecutor's actions rose to the level of misconduct. The record discloses several incidents where Assistant County Attorney Alan Ostergren referred to or elicited testimony regarding the fatal motor vehicle accident. At the outset of the State's case, the prosecutor commented in the opening statement:

> Another person present at the party who will testify is someone named Thomas Tuttle. Thomas Tuttle was over the age of 18. He was provided marijuana, and unfortunately and tragically, after leaving the Defendant's residence several hours later, at an intersection south of Wilton, he slammed into a car being driven by a 35-year-old mother of three named Elaine Norton, and that impact killed her. It was severe enough that, even though she was seat belted into her vehicle, she was ejected from it. That's how hard the collision was, and that's when law enforcement first starts on the trail of Toby Grage. Obviously, when that collision occurred, the authorities were called. Ambulances, paramedics, state troopers, deputies, people rushed to the scene, and unfortunately, it was too late to help Elaine Norton. She was killed almost instantly in that collision.
>
> * * *
>
> We spent quite a bit of time in jury selection because I think you can understand that this is an emotional case, and even though we were not able to charge Toby Grage with directly taking the life of Elaine Norton, clearly, that issue is very important in this case, and that's why we spent so much time in jury selection because she died that day.
>
> * * *
>
> I'm going to ask you for a verdict that says this man is guilty. I'm going to ask you to judge his actions on July 13, 1999, the last day of Elaine Norton's life. Thank you.

In addition, testimony was elicited from several witnesses concerning the fatal nature of the accident. The record is clear defense counsel did not file a motion in limine concerning details of the accident, did not object to the prosecutor's opening statement or request a mistrial following it, did not object to the questions propounded to witnesses, and did not request a limiting instruction.

The prosecutor continued commenting about the fatal motor vehicle accident through sentencing. The prosecutor made the following statement to the court at the time of sentencing:

> As you heard from the testimony, there was a fatality involved, and it's only really because of this defendant's luck and how the test results worked out that he's not sitting here having been convicted of manslaughter or homicide by vehicle. That State believes this defendant should be incarcerated for as long as the Court can. Thank you.

An attorney for the State is under a duty to ensure both the State *and* the defendant receive a fair trial. *State v. Tate*, 341 N.W.2d 63, 65 (Iowa Ct. App. 1983) (emphasis added). The prosecutor's job is not simply to secure convictions. *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). "It is central to our system of jurisprudence that a defendant must be convicted only if it is proved he committed the offense charged and not because he is a bad man." *State v. Johnson*, 222 N.W.2d 483, 488 (Iowa 1974).

Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa Ct. App. 1997) (quoting *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973)). In determining whether such impropriety is a basis for reversal, it is highly

relevant if the conduct was isolated and inadvertent or widespread and deliberate. *State v. Greene*, 592 N.W.2d 24, 32 (Iowa 1999).

The United States Supreme Court has also discussed the role of prosecuting attorneys and their concomitant obligations as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he in a peculiar and very definite sense is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935).

We are hard pressed to find any possible relevancy that the automobile fatality would have to the actual offenses charged in this case. We agree with the statement of the assistant county attorney that he was "not able to charge Toby Grage with directly taking the life of Elaine Norton . . . ." As such, we condemn his further statement that the issue of the automobile fatality "is very important in this case . . . ." We also condemn his statement Grage's actions should be judged in conjunction with "the last day of Elaine Norton's life." The actions of the prosecutor, pure and simple, were calculated to inflame the passions or prejudices of the jury. *See* ABA Standards for Crim. Justice § 3-5.8(c) (2nd ed. 1980). In addition, his actions were widespread and deliberate.

See Greene, 592 N.W.2d at 32; s*ee also United State v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983).

We conclude in the instant case the prosecutor's "zeal exceeded his judgment" as he attempted to secure Grage's conviction on the basis of innuendo. *See Johnson*, 222 N.W.2d at 488. Evidence of Tuttle's fatal motor vehicle accident could only serve to arouse the jury's sympathies and provoke its instinct to punish or to elicit a response from the jurors not justified by the evidence. *See State v. Plaster*, 424 N.W.2d 226, 231-32 (Iowa 1988). The prosecutor's actions rose to the level of misconduct.

The issue of inappropriate statements by overzealous prosecutors was discussed in *Darden v. Wainwright*, 477 U.S. 168, 182-83, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144, 158 (1986), where the United States Supreme Court held the prosecutor made an improper closing argument, but that said argument did not deprive the defendant of a fair trial. Justice Blackmun filed a dissenting opinion in which Justice Brennan, Justice Marshall, and Justice Stevens joined. Blackmun's dissent included the following:

> Twice during the past year—in *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), and again today—this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:
>
> > "This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged

> offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary"
>
> I believe this Court must do more than wring its hands when a State uses improper legal standards . . . and permits prosecutors to pervert the adversary process. I therefore dissent.

Darden, 477 U.S. at 205-06, 106 S. Ct. at 2484, 91 L. Ed. 2d at 173 (dissent) (citations and footnotes omitted).

Ineffective Assistance of Counsel. In the instant case, the standard of review for ineffective assistance of counsel comes into play. We conclude counsel for the defendant failed to perform an essential duty when counsel failed to file a motion in limine, object to the prosecutor's opening statement or request a mistrial following it, did not object to the questions propounded to witnesses and did not request a limiting instruction. However, the critical issue in this case is whether said failure to perform an essential duty caused prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697. This standard requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The ultimate concern must be the issue of the fundamental fairness of the proceeding. *Id.*

"Unfair prejudice" is defined as "an undue tendency to suggest decisions on an improper basis, commonly, though not necessarily, an emotional one." *Plaster*, 424 N.W.2d at 231 (quoting Fed. R. Evid. 403 advisory committee's note). Evidence that:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

Id. at 231-32 (quoting 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 402[03], at 403-33--40 (1986)).

A criminal trial should "reliably serve its function as a vehicle for determination of guilt or innocence. . . ." *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35, 46 (1999). Without such reliability, the criminal punishment cannot be regarded as fundamentally fair. *State v. Cooley*, 608 N.W.2d 9, 17 (Iowa 2000). Thus, "it is not the prosecutor's misconduct [that] entitles a defendant to a new trial, but rather any resulting prejudice [that] prevents the trial from being a fair one." *Greene*, 592 N.W.2d at 31 (quoting *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989)). Our supreme court is "slow to hold matters calculated to arouse prejudice non-prejudicial in a criminal case." *State v. Kimball*, 176 N.W.2d 864, 867 (Iowa 1970).

The combination of prosecutorial misconduct and ineffective assistance worked in concert to deprive Grage of a fair trial. We acknowledge the other evidence against Grage is substantial.[2] However, we cannot say with confidence that the outcome of his trial would have been the same without the "flagrant, intentional, and inflammatory" actions of the prosecutor. Under the unique facts and circumstances present in the instant case, our confidence in the outcome has been undermined. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

In the instant case, Grage was subjected to both prosecutorial misconduct and ineffective assistance of counsel. We conclude the prosecutor's statements and the evidence alluding to the fatal accident caused by Tuttle were inherently prejudicial to Grage and precluded him from receiving a fair trial.

We would be remiss in not adding one final note—to send the strongest possible message to prosecutors to try cases based upon relevant evidence and approved trial strategies. *United States v. Johnston,* 127 F.3d 380, 403 (5th Cir. 1997);[3] *Blanks*, 479 N.W.2d at 605.

Remaining Issues. Because we reverse the judgment of conviction and sentence, and remand for a new trial, we need not address the remaining issues raised by Grage in his appeal.

REVERSED AND REMANDED FOR NEW TRIAL.

---

[2] Nothing in this opinion is meant to contradict the decision of the standard of review set out in *Ledezma v. State*, 549 N.W.2d 307, 310 (Iowa Ct. App. 1996).

[3] The United States Court of Appeals for the Fifth Circuit, in reversing a conviction as to one of several defendants, recently stated, "somewhere we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial. This is such a case." *United States v. Johnston,* 127 F.3d 380, 403 (5th Cir. 1997).