IN THE COURT OF APPEALS OF IOWA

No. 1999-593 (9-854) / 99-738
Filed February 9, 2000

STATE OF IOWA,

Appellee,

vs.

EVERETT DUWELL KING,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Winnebago County, Bryan H. McKinley, Judge.

Everett Duwell King appeals from the judgment and sentence entered following his conviction of two counts of forgery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Robert Reding, County Attorney, and Rolf Aronsen, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Everett D. King of two counts of forgery. He appeals, contending the prosecutor engaged in misconduct. We affirm.

I. Background Facts and Proceedings

On August 28, 1998, King and his wife met Mark and Tonia Ward at a bowling alley, where they talked, danced and drank. King left with the Wards and ended up at Tonia's apartment, where he fell asleep on the couch.

The following morning, Mark and Tonia woke up to find items gone from the apartment. Several days later, Tonia was paying her bills when she discovered her checkbook was missing two checks. Ward contacted her bank and learned the checks had been cashed at two local stores. Tonia contacted the police. During police questioning, King admitted he used the checks, but maintained those checks were delivered to him along with a get well card for his sick daughter.

The State charged King with two counts of forgery, in violation of Iowa Code sections 715A.2(1)(b) and 715A.2(2)(a)(3) (1997). A jury convicted King and he filed a motion for new trial, which the district court denied. The court sentenced King to serve an indeterminate prison term not to exceed five years on each count. This appeal followed.

II. Error Preservation

King is African-American. His step mother, Darlene Hanson, is white. King contends the prosecutor's questioning of Hanson concerning her relationship with King's father, an African-American, impermissibly injected race into the case and denied him a fair trial. The State counters King did not preserve error by objecting to the testimony and, in any event, the

prosecutor's questions were appropriate to elicit Hanson's potential bias in favor of King. In the alternative, King argues if the court finds his attorney did not preserve error his attorney was ineffective in failing to object.

Our review of the record discloses King's attorney raised a relevance objection at the close of the challenged testimony. We conclude this objection is insufficient to preserve error on the prosecutorial misconduct issue. *See State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996). However, we find the record adequate to review the issue under the rubric of King's ineffective assistance of counsel claim.

III. Ineffective Assistance of Counsel

Generally, a defendant seeking to establish ineffective assistance of counsel must show: (1) counsel breached an essential duty and (2) prejudice resulted. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995) (citations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674, 698 (1984). While we generally preserve such claims for postconviction relief, we may resolve them on direct appeal if the record is adequate. *State v. Risdal*, 404 N.W.2d 130, 131 (1987). Our review of King's constitutional ineffective assistance of counsel claim is de novo. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). We presume counsel performed competently and place the burden on the defendant to prove the elements set forth above by a preponderance of the evidence. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997); *Risdal*, 404 N.W.2d at 131.

King challenges the following interchange between the prosecutor and Hanson:

> Q: How did you—What's your relationship to Everett King?
> A: I was with his dad 15 years.
> Q: You were with his dad. What do you mean by with his dad?
> A: Well, married. I was with his dad and he died in my arms.
> Q: I didn't ask whether he died in your arms or anything else. What was your relationship to his dad?
> A: Wife.
> Q: Okay. Thank you. And when did you get married to him?
> A: Uh, September 1979.
> Q: Okay. When you got married—then when did he die?
> A: October 5th, 19—

At that point, the court sustained a relevancy objection. King maintains this testimony appealed to jurors' racial biases by underscoring the "cross racial relationship" between Hanson and King's father. Therefore, he argues King's attorney was ineffective in failing to ask the court for a curative instruction or a mistrial. We disagree.

To establish a claim of prosecutorial misconduct, a defendant must show both misconduct and prejudice. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997). "As a firsthand observer to both the claimed misconduct and any reaction by the jury, the trial court is better equipped than an appellate court to determine the presence of prejudice." *Id.*

The district court rejected King's claim of prosecutorial misconduct, concluding:

> I believe the questions that were asked of the stepmother as to background, length of the relationship, familiarity of the defendant, are all probative questions which may be asked to determine issues of bias or prejudice, and therefore, I did find the line of questioning to be appropriate.

We agree with this conclusion. As we find no prosecutorial misconduct in this line of questioning, we conclude King's attorney did not breach an essential duty in failing to request a curative instruction or mistrial following this testimony. Therefore, we reject his ineffective assistance of counsel claim and affirm King's conviction and sentence.

AFFIRMED.