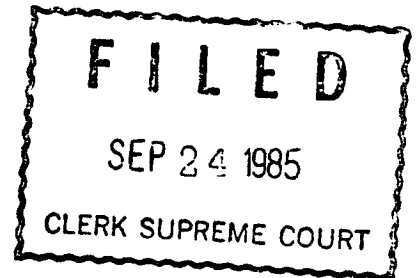


IN THE COURT OF APPEALS OF IOWA



STEVEN RAY WYCOFF,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

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Appeal from the Iowa District Court for Lee County, John C. Miller,
Judge.

Petitioner appeals from a denial of postconviction relief, asserting thirteen
separate errors occurred in his trial. **REVERSED.**

James P. Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney
General, for respondent-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

OXBERGER, C.J.

On November 3, 1975, an inmate at the Iowa State Penitentiary was stabbed numerous times and died. In a trial six months later, a jury found another inmate, Steven Wycoff, guilty of first-degree murder in the death of Cecil Polson. Ten years later, after one appeal, a thorough compilation of materials used at the trial, and a postconviction hearing in February 1983, Wycoff's appeal has reached this court from a denial of postconviction relief. We reverse the trial court decision and grant petitioner Wycoff's application for postconviction relief.

The evidence of petitioner's guilt was circumstantial. Polson was heard screaming in cellhouse No. 18 of the penitentiary. The cellhouse was secured and his body discovered in his cell. Inmate James Cain said he had seen Wycoff a few seconds before the murder in another portion of the cellhouse, making it impossible for Wycoff to have murdered Polson. A prosecution witness, inmate Thomas Garrett, testified he had overheard a conversation between Wycoff and another inmate, Harold Tressler, concerning a plan to rob Polson. He also says he saw Wycoff scaling up and down the walls of cellhouse No. 18. Two inmates who celled next to Polson, Elmer Cartee and Patrick Russell, said at the postconviction relief hearing they had heard Garrett and the victim fighting prior to the murder and heard Garrett threaten to kill Polson. At the grand jury proceedings, Cartee and Russell said they knew nothing about the murder. Cartee and Russell later sent a letter to Wycoff's attorney saying they had information favorable to Wycoff, but Wycoff's attorneys, Kent Hutcheson and Gordon Liles, did not call them as witnesses. Security director James Menke testified for the prosecution regarding a statement he said Tressler made that Wycoff wanted to rob Polson. Tressler denied any statement had been made to him by Wycoff regarding Polson. Tressler also testified that prior to the

murder, he and Wycoff were in his cell eating hamburgers. He says he injected the drug "T.H.C." into Wycoff's arm with a syringe. This testimony was important because of a mustard spot and alleged blood stain on Wycoff's shoe. When Polson struggled with his attacker, a bottle of mustard in his cell broke. Tressler's testimony aided Wycoff's defense in accounting for the stains. Tressler also testified in a deposition that he had gotten the drugs he used from security officer Menke. This testimony was never revealed to the jury.

The attorneys also hotly contested whether blood was present on Wycoff's jacket. The prosecution witness said there was a positive test for blood on the jacket and the defense expert witness said it was not human blood. The director of the War Memorial Bank testified for defense at the postconviction hearing that the prosecution expert's tests were unreliable and his tests showed there was no human blood on the jacket.

The petitioner raises thirteen separate points of alleged error in his appeal, including claims of prosecutorial misconduct, ineffective assistance of counsel, denial of due process of law, and the right to compulsory process. We find a number of these claimed errors to be without merit. However, we also find significant an error which occurred during trial, which was prejudicial to petitioner. Because of prosecutorial misconduct in making a statement to the jury that the prosecutor knew was incorrect, we reverse the trial court.

Inmate Cain provided Wycoff with an alibi by stating he had seen Wycoff on the range of cells below him, making it impossible for Wycoff to murder Polson. The State attempted to impeach Cain by asking him if it wasn't true he had made a statement to correctional officer Kenneth Bowen to the effect he knew Wycoff killed Polson. Prosecutor Richard Williams asked the question, he says, because a DCI report had indicated such a conversation took place. Cain denied he had ever made the statement. After this, Williams had Bowen

subpoenaed and asked Bowen if Cain had ever made the statement to him. Bowen said that no statement had been made to him by Cain. Williams then told Bowen to go home and that he was not needed as a witness.

The petitioner claims the question was improper because there was no factual basis for Williams to ask it. The DCI report, the State says, led Williams to believe the conversation had taken place. However, this report was not in evidence. The matter did not end there. In closing arguments, the defense attorney referred to the fact that if the statement by Cain had ever been made to Bowen, the State could have placed Bowen on the stand to confirm it. Since Bowen was not called, the defense noted, it could be inferred Cain was correct and the conversation never took place. In his rebuttal argument, Williams made the following statement, although he knew at the time that Bowen denied Cain had ever spoken to him:

He tells you about the correctional officer Bowen. He said to you in his closing argument that Bowen is a guard. Ladies and gentlemen, Mr. Bowen is not a guard any more. I'm sorry that he wasn't here as a witness. He was subpoenaed. I had hoped he would be cooperative. I'm sorry but he wasn't.

(emphasis added). The prosecutor implied Bowen would confirm that Cain previously implicated Wycoff and that the only reason Bowen did not appear was because Bowen was uncooperative. In fact, the prosecutor knew Bowen would deny the statement was made and knew Bowen would have taken the stand to confirm that. Williams was aware it was untrue to claim Bowen was uncooperative and knew that that was not the reason he did not appear as a witness. Whether the initial question to Cain was justified or not, we find the comment in closing to be more egregious and confine our discussion to this point.

We initially must address the question of whether this issue may now be presented in a postconviction relief hearing. When raised and adjudicated against

defendant in his prior appeal he is barred from reasserting the issue. See Rinehart v. State, 234 N.W.2d 649, 655 (Iowa 1975). If not raised in the prior appeal, the petitioner here must show by a preponderance of the evidence there is a "sufficient reason" for not raising the issue the first time and show the error complained of created actual prejudice. Polly v. State, 355 N.W.2d 849, 855 (Iowa 1984); Iowa Code § 663A.8 (1985).

The statement made by Williams in his closing arguments was never presented on appeal. Instead the issue raised by Wycoff's counsel regarding closing statements was whether Williams improperly placed the jury in a vicarious position by asking them what it would feel like to be an inmate testifying against another inmate. Therefore, this issue is raised here for the first time.

In Polly, the court commented on what type of situation would allow an appellate court to entertain a question for the first time in postconviction proceedings regarding the petitioner's trial:

Failure to appeal bars relief in a postconviction action on the ground of abuse of process only as to factual and legal contentions which the postconviction applicant knew of at the time of the original trial court proceeding and which he deliberately and inexcusably failed to pursue on appeal.

Polly, at 855 (citing with approval Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979)). In this case, the petitioner's attorneys represented correctional officer Bowen in a separate disciplinary matter connected with his work at the prison. As a result, they had contact with Bowen and knew that he knew nothing about Wycoff's case. Hutcheson testified at the postconviction hearing he knew nothing about the conversation between Bowen and Williams until the postconviction hearing. Liles says he knew that Bowen was subpoenaed by Williams, but could not recall at the postconviction hearing whether he later found out the substance of the talk between the prosecutor and Bowen. Bowen's testimony does not reflect a conversation occurred with Liles after he told the prosecutor he knew nothing.

While the record indicates that neither attorney directly knew the substance of the conversation with the prosecutor, Liles testified it would have been a "logical assumption" on his part at the time Bowen was subpoenaed by the State that Bowen told the prosecutor he knew nothing.

Wycoff contends that the reason no objections were made or the issue raised was because there was a conflict of interest on the part of the defense attorneys since Liles was representing Bowen at the same time he represented Wycoff. Bowen testified he did not want to appear at trial because he was afraid it could affect the disciplinary matter. However, Liles responds by saying since Bowen knew nothing he saw no reason to object after Cain denied the conversation. The State also argues that Liles' decision to handle the matter in closing argument was a strategic decision.

In the postconviction proceedings, Liles was never directly asked why he did not object to either the questions to Cain or to the prosecutor's statement in closing. We cannot agree with the State's claim it was a strategic decision to handle the matter in closing argument. The comment by the prosecutor came in rebuttal, and there was no defense argument to follow which would have countered the statement. Instead, the defense let go a statement by the prosecutor which showed that but for Bowen's uncooperative attitude, Bowen would have testified that the conversation did take place. We are reluctant to agree with petitioner that it was Liles' concurrent representation of both men which prevented him from objecting without more evidence to support the claim.

However, we find there was "sufficient reason" for not raising the question and objecting during the argument of the state. Two inferences were made to the jury by William's statement. One was that Bowen was not appearing because he was not cooperating. The second was that if he would appear, Cain

would be impeached by Bowen's statement. It appears evident to this court that the reason Liles did not object was because he did not realize the significance of William's statement concerning the second point. In the postconviction hearing Liles continued to emphasize that Bowen knew nothing and so could add nothing to the case. In concentrating on this aspect, he missed the point that the prosecutor was using Bowen's absence to impeach Cain.

If Liles did talk to Bowen and found out that Bowen told the prosecutor he was not told by Cain that Wycoff killed Polson, then Liles should have objected. Not to do so was ineffective. Ineffective assistance of counsel is sufficient reason for not previously raising a claim, Lamphere v. State, 348 N.W.2d 242, 215 (Iowa 1984). If he was not aware the prosecutor knew better, and did not discover the prosecutor's true knowledge until now, there is sufficient reason not to raise the prosecutorial misconduct on appeal. In either case, there is sufficient reason for not initially raising the question in the first appeal.

The actual prejudice is evident. Cain's testimony placed Wycoff in an area where he could not have committed the murder. If believed, Wycoff would have been acquitted. The issue is properly presented in this appeal from the postconviction hearing.

It is the prosecutor's responsibility to assure a fair trial for a criminal defendant, and not solely to secure a conviction. State v. Tate, 341 N.W.2d 63, 65 (Iowa Ct. App. 1983). A prosecutor cannot use improper methods to achieve a conviction. State v. Levy, 160 N.W.2d 460, 467 (Iowa 1968), 32 A.L.R. 3d 893 (1970). It is not the prosecutor's misconduct alone which warrants a new trial, but proof that the misconduct was prejudicial to the defendant and deprived him of a fair trial. Id. The fact that an improper act is made intentionally tends to show prejudice. See State v. Frese, 256, Iowa 289, 295, 127 N.W.2d 83, 87 (1964).

The comment in rebuttal closing to the jury should not have been made. Williams knew no statement was made by Cain to Bowen, yet clearly indicated to the jury that the only reason Bowen did not testify that the statement was made was because Bowen would not cooperate.

This type of conduct has been condemned by our courts. In one case where an insinuation was made by the prosecutor that the defendant was responsible for the absence of an important prosecution witness, the court stated:

The real objection to this tactic was stated in State v. Haney, 219 Minn. 518, 18 N.W.2d 315, 317, as follows, "The State is not permitted by means of the insinuation or innuendo of incompetent and improper question to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial. In State v. Bass, 93 N.H. 172, 37 A.2d 7, the New Hampshire Supreme Court said, " * * * An attorney should not suggest in his questions facts that may be prejudicial unless there is or will be evidence of such facts."

We have held to like effect in State v. Poston, 199 Iowa 1073, 1075, 203 N.W. 257, 258. We have recently criticized the practice of prosecuting attorneys who persist in asking improper questions and who needlessly flirt with reversible error.

State v. Carey, 165 N.W.2d 27, 31-32 (Iowa 1969).

The prejudice to the defendant is apparent. The prosecutor placed in the minds of the jurors the idea that a key defense witness previously implicated Wycoff in the matter. Where the guilt of the petitioner is unclear, the court is more inclined to find prejudice. See U.S. v. King, 461 F.2d 53, 57 (8th Cir. 1972); State v. Roscum, 119 Iowa 330, 333 93 N.W. 295, 296 (1903). The proof of defendant's guilt here was far from clear. Rather, the proof was entirely circumstantial. This is similar to the situation discussed at State v. Roscum, at 332, 93 N.W. at 296, where the court said, "the purpose to get before the jury by indirection the fact that appellant was charged with other depredations, and thereby put him to disadvantage in the pending trial, is too clear to admit

of doubt. If convictions cannot be otherwise secured, it is far better to permit the guilty to go unpunished than to resort to expedients which are essentially unfair, and destructive of the settled rules of evidence."

We find the acts of the prosecutor were improper and caused prejudice to the defendant. As a result, we find he was denied due process of law as secured by the Iowa and United States Constitutions, and postconviction relief must be granted.

REVERSED.

Schlegel, J., concurs and Sackett, J., dissents.

SACKETT, J. (dissenting)

I would affirm the trial court's denial of postconviction relief.