IN THE COURT OF APPEALS OF IOWA

No. 1999-544 (9-805) / 98-2117
Filed February 9, 2000

WAYNE ALLEN BERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Wayne Berry appeals a district court ruling denying his application for postconviction relief. Berry contends his trial counsel was ineffective. **AFFIRMED.**

Jason P. Happel of Singer, Pasley, Holm, Timmons, Mathison & Curtis, L.L.P., Ames, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, James J. DeTaeye, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Petitioner-Appellant Wayne Berry was convicted following a jury trial of second-degree murder, in violation of Iowa Code Section 707.3 (1993), and assault with intent to commit serious injury, in violation of Iowa Code section 708.2 (1993). We affirmed his conviction on appeal. *State v. Berry*, 549 N.W.2d 316 (Iowa App. 1996). Berry then filed a petition for postconviction relief claiming his trial and appellate attorneys were not effective. The district court denied his application and this appeal follows. We affirm.

Berry was convicted after he stabbed John Koch in the chest with a knife. Berry claimed he stabbed Koch in self-defense. On direct appeal Berry claimed there was insufficient evidence to support the conviction of second-degree murder and the district court erred in not allowing him to impeach testimony of a witness with a prior inconsistent statement. *Id.* at 317.

The evidence at trial was that following a telephone invitation Berry went to Koch's apartment in Marshaltown, Iowa, where Koch waited in the alley. Koch had hidden the leg of a coffee table in the back of his pants.

After Berry got out of his car Koch went toward him with the coffee table leg and Berry drew a knife. Berry stabbed Koch. The hostilities between the men ended and the two men went to Koch's apartment. Berry tried to call 911 but Koch resisted. Emergency assistance was finally requested and Berry left the apartment. He drove home, and taking his wife's car drove to a friend's business. The friend took Berry to a bar in Gladbrook, Iowa, where Berry was arrested. Koch died from internal bleeding. An autopsy showed a stab wound

lacerated Koch's right subclavian vein and his clavicle bone was ninety percent severed.

Berry testified at trial Koch approached him outside the apartment and held the table leg in a threatening manner. Berry testified he stabbed Koch only after Koch dropped the table leg and displayed a knife he was carrying.

We review ineffective-assistance-of-counsel claims in a postconviction proceeding under a de novo standard. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998); *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). To prevail Berry must prove by a preponderance of the evidence that his counsel failed in an essential duty and that prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998); *State v. Allen,* 565 N.W.2d 333, 336 (Iowa 1997). In resolving an ineffective-assistance claim, the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Meier v. State,* 337 N.W.2d 204, 206 (Iowa 1983). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). To be successful on his claims Berry needs to overcome a strong presumption that his counsel was competent. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694-95 (1984). To establish prejudice Berry must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction proceedings unless there is sufficient reason for not properly raising it previously. *Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981).

The claims Berry now raises were not raised on direct appeal. He contends his appellate counsel was ineffective in failing to do so. Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. *Id.* at 235; *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980).

Berry contends that his trial attorney should have objected to alleged misconduct of the prosecutor in her closing argument. He claims the prosecutor improperly argued her personal beliefs.

Prosecutorial misconduct warrants a new trial when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973). To establish prosecutorial misconduct a defendant must show both that there was misconduct and that he or she suffered prejudice as a result. *See State v. Farmer*, 492 N.W.2d 239, 242 (Iowa App.1992). A prosecutor may properly draw conclusions and argue all permissible inferences that reasonably flow from the evidence during closing argument. *See State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). The prosecutor may not create evidence by argument or interject personal beliefs. *Id.* A prosecutor is precluded from using a closing argument to personally vouch for a defendant's guilt or a witness's

credibility. *State v. Williams*, 334 N.W.2d 742, 744 (Iowa 1983). This is true whether the personal belief is based on knowledge of facts not presented at trial, the prosecutor's experience in other cases, or any other ground other than the weight of the evidence presented at trial. *Id.*

Berry objects to three specific statements made by the prosecutor. His first objection is to the prosecutor's statement concerning the credibility of two witnesses to some of the events. In reference to their testimony, the prosecutor said, "I don't think they were trying to mislead, I think they were telling you what happened."

Berry's second objection deals with the prosecutor addressing Berry's situation during the time leading to the stabbing. Her statements were, "I believe they were in between his car, he could have left the scene, he could have talked to John. All kinds of alternatives there."

Berry's third objection is to the prosecutor relating that he threw away the knife, changed cars three time, changed his clothes, drove out in the country and claimed self-defense, and then said, "I don't think so. There was not self-defense in this."

A prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989); *State v. Deases*, 479 N.W.2d 597, 601 (Iowa App. 1991). None of the challenged remarks of the prosecutor meet this test. We affirm the district court on this issue.

Berry next claims his trial attorney was ineffective in failing to object to the prosecutor using facts in her closing argument that were not in evidence. His objection is to the prosecutor indicating Koch was a nice person and Berry managed to talk him into saying nothing happened and covering up the stabbing. We agree with Berry that the prosecutor's statements in this regard may have been misleading at least in part because there was evidence from both Berry and another witness that Berry asked that someone call 911. There also was evidence that Koch might not have wanted to call authorities as there was a warrant out for his arrest.

The focal issue at trial was Berry's claim of self-defense. We recognized that this court said in *Berry*, 549 N.W. 2d at 318, that "much of [Berry's] conduct after the stabbing was inconsistent with his claim of self defense." However, the self-defense issue focused on what happened at the time of the stabbing not what happened afterwards. Berry has failed to show the required prejudice to succeed on this claim.

Berry also objects to the prosecutor making an alleged misstatement in saying that Berry called Koch when he was angry, was going over there to fight, and he provoked an argument with Koch over the telephone. These are reasonable inferences to be drawn from the evidence at trial. There was testimony Berry arrived at Koch's apartment with tires squealing and armed with two knives and Koch met him with a table leg.

Berry further contends the prosecutor commented on his post arrest silence. The prosecutor said that Berry did not tell the authorities what

happened; that Berry was uncooperative with authorities, and had eighty-eight days knowing the state's evidence to concoct his story.

In *State v. Hutchison*, 341 N.W.2d 33, 39 (Iowa 1983) the Iowa court, citing *Catches v. United States*, 582 F.2d 453, 458 (8th Cir.1978), said:

> A statement is deemed to be an impermissible reference to defendant's silence if either (1) the prosecutor manifestly intended to refer to the defendant's silence, or (2) the jury would "naturally and necessarily" interpret the statement to be a reference to the defendant's silence.

Hutchison, 341 N.W.2d at 39. We do not find the prosecutor's statement to have done either. We affirm on this issue.

Berry next claims that his trial attorneys should have called a number of witnesses to testify in his behalf. The district court found that each witness Berry contends should have been called was interviewed either by Berry's trial attorneys or their investigator and they determined it not to be in Berry's interest to have these witnesses called in his behalf. The attorney determined that the witnesses interviewed either were not cooperative or could be impeached to Berry's detriment. We agree with the district court that Berry has failed to show his trial attorneys' incompetence in this regard.

Berry next claims his trial attorneys should have stricken a particular juror who he contends related on voir dire that he had a nephew whose wife was murdered. When specifically asked about the murder the juror said, "It doesn't matter because it was in California, and I missed the funeral and everything, and so I didn't hardly know anything about it."

The juror carried a knife and had been on one or two juries that rendered an acquittal in a criminal case. We cannot say Berry's trial attorneys were ineffective in leaving this juror on the panel.

Berry's last complaint is that even if one of these errors standing alone is not sufficient to support a finding of ineffective assistance of counsel, that based on the cumulative effect of the alleged errors, he should have relief. We agree with Berry that there are instances where the cumulative effect of an attorney's errors can entitle a defendant to relief. *See State v. Hardy*, 492 N.W. 2d 230, 236 Iowa App. 1992). The record here does not support such a finding.

AFFIRMED.