IN THE COURT OF APPEALS OF IOWA

No. 6-774 / 95-2053

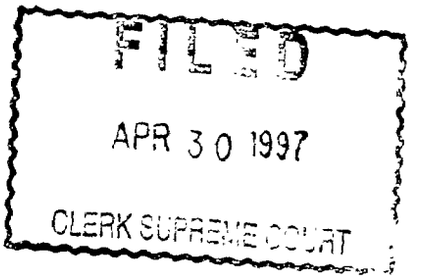
STATE OF IOWA,

Appellee,

vs.

CESAR ARMANDO HERRARTE,

Appellant.



Appeal from the Iowa District Court for Sioux County, Phillip S. Dandos, Judge.

Defendant appeals from judgment entered, following jury trial, of first-degree murder, assault causing bodily injury, and simple assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich and Charles Thoman, Assistant Attorneys General, and Mark J. Schouten, County Attorney, for appellee.

Heard by Cady, P.J., Streit, J., and McCartney, S.J.* Huitink, J., takes no part.

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, P.J.

Cesar Herrarte appeals from judgment of first-degree murder, assault causing bodily injury, and simple assault entered following a jury trial. We affirm.

Herrarte and Guillermo Escobedo were charged with first-degree murder, willful injury and aggravated assault after a fight broke out at a party in their residence in Hawarden, Iowa. Justin Younie suffered multiple, severe stab wounds during the fight and died. Kevin Kaskie was wounded. They were stabbed with knives used in a meat packing plant.

Herrarte and Escobedo were jointly tried. They raised the defenses of justification and intoxication. Herrarte is Guatemalan. Escobedo is Hispanic. Younie was Caucasian, as is Kaskie. There were many other young Caucasian men at the party on that tragic evening. Herrarte and Escobedo claimed they were victims of aggressive conduct directed towards them and reacted in self-defense out of fear.

Prior to jury selection, the district court gave several instructions to the panel concerning the case, as well as their obligations and duties as prospective jurors. One instruction pointed out the defendants were "Hispanics" and the victim was a "white man," and admonished the panel to disregard the nationality of the defendants, while emphasizing the importance of a fair trial based only on the facts and law.

The race or ethnicity of the defendants and victim was further injected at various times throughout the trial. A videotaped interview of Herrante conducted by law enforcement after his arrest was admitted into evidence. In the interview,

Herrarte repeatedly referred to individuals at the party as a group of "white people" or "the white guys." Additionally, both the prosecutor and defense counsel, as well as various witnesses, referred to groups as "white boys" and "Hispanic boys."

In addition to evidence of self-defense, Herrarte presented evidence of his consumption of alcohol prior to the fight. There was testimony Herrarte drank alcoholic beverages excessively, vomited and was unconscious for a period of time. Herrarte, however, offered no expert testimony concerning his intoxication defense. The State offered evidence that Herrarte may have been involved in drug use or drug sales during the evening. Herrarte's counsel did not object to this evidence.

Herrarte appealed following the jury verdict and subsequent sentencing. He contends the prosecutor committed several instances of misconduct during closing arguments, including (1) infusing race, nationality, and ethnicity into the case; (2) displaying an overhead transparency stating "Innocent People Don't Lie;" (3) portraying Herrarte as deceptive; (4) expressing his personal belief by stating "one needs to be awfully intoxicated before one doesn't have a clue as what he or she is doing;" and (5) insinuating that a defense witness used drugs on the night of the offense. He argues the court's cautionary instructions to the jury did not cure the prejudice. He further contends his trial counsel was ineffective in failing to object to inadmissible evidence tending to show that he used drugs or was selling drugs.

I. Prosecutorial Misconduct

In reviewing the claims of prosecutorial misconduct, we must determine whether misconduct occurred, and, if so, whether the prejudice denied Herrarte a fair trial. *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa App. 1995). It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather the resulting prejudice which prevents the trial from being fair. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). The party claiming prejudice bears the burden of proof. *Id.*

Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct. *State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985). We will overturn the trial court's decision only upon finding an abuse of discretion. *Anderson*, 448 N.W.2d at 33. An abuse of discretion appears when "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Herrarte alleges five specific instances of misconduct by the prosecutor during closing argument. We will address each claim separately.

Herrarte first argues the State infused race into the closing argument. This claim is based on the following statements by the prosecutor during closing argument:

> And the white guys -- the defendants called the other witnesses the white guys. And I'll use the term just for convenience during the course of this opening argument [*sic*]. We had the Mexicans or the Guatemalans and the white guys, and they didn't know one another. They hadn't been friends. [1]

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[1] These statements were made by the prosecutor as he was describing the circumstances which led up to the stabbings as revealed by the evidence. For context, the

Herrarte further argues the prosecutor's remarks set up distinctions based upon nationality and ethnicity, which subtly encouraged the jury to choose between the locals and the outsiders. He believes this was done through several character assassinations based on nationality, and compounded by the infusion drug use and the paraphrasing of certain testimony suggesting the defendants were "a little strange."

In resolving the issue, we observe the trial court admonished the jury at the conclusion of the State's closing argument to give no consideration to any matters of ethnicity discussed by the prosecutor. The trial court instructed the jury:

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following are the statements which surrounded this excerpt:

Let's set the stage if we might. You recall the evidence. It indicated that the defendants had been living at this house at 909 [Avenue "T" in Hawarden] for less than ten days. We don't know how long they had been in the area for sure.

It appears Mr. Escobedo had been here before. He's originally from Mexico. Mr. Herrarte is originally from Guatemala. He had been in the Hawarden area before. But in this instance they had come up shortly after the first of the year from Missouri. Stayed sometime at the hotel and the motel in Hawarden until they ran out of money.

And then they met Mark Salzer, who apparently they knew before, and moved in with him. They had been in this house for less than ten days prior to the time the incident happened.

It's important to realize and understand why the people did as they did. To understand as it was pretty clearly set out, that none of these people knew one another.

And the white guys -- the defendants called the other witnesses the white guys. And I'll use that term just for convenience during the course of this opening [*sic*] argument. We had the Mexicans or the Guatemalans and the white guys, and they didn't know one another. They hadn't been friends.

It was almost a chance meeting that they came together at this party on January 14, 1995. The Mexicans, the defendant, talked with Raphael. They said, "We want to have a party. Go out and get some girls. We want to meet some girls."

> The other matter that I need to take up is a very serious matter. From the beginning the court has endeavored to see that the defendants in this case got a fair trial. That's what the system requires.
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> In the State's argument I have previously mentioned certain matters that you must disregard. The prosecutor, in the Court's opinion, went over the line. And the Court is trying to make sure that those matters that he brought up are not used as a basis of your decision.
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> The recess lasted a little longer than it would have except the Court needed to take up additional matters that were brought in -- brought up in the prosecutor's argument which the Court considers went over the line and has nothing to do with this case.
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> First he referred to the defendants as Hispanic's and to the other people as white guys. During the voir dire of the jury I read an instruction with regard to the ethnicity of the defendants and that matter has no place in this trial. Those comments have no place either and should be disregarded.
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> Now you can understand by the tone of my voice that I'm upset that these things occurred. I told you I want a fair trial. I think the prosecutor went over the line. And I tell you that in order that you can disregard those comments and give them no weight whatsoever.

Racial arguments made by a prosecutor to obtain a conviction denies a defendant due process. *State v. Blanks*, 479 N.W.2d 601, 605 (Iowa App. 1991). The United States Supreme Court has condemned the use of race by the prosecution. *Id.* (citing *Baston v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986)). Thus, when a defendant contends the prosecutor injected race in the case during closing argument, we examine the proceedings very closely to see whether the contention is true and whether defendant suffered prejudice. *Id.*

The role of a prosecuting attorney is twofold. The prosecutor serves the law, and must both ensure that "guilt [does] not escape or innocence suffer." *Blanks*, 479

N.W.2d at 603 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1414, 1321 (1935)). "It is as much [a prosecutor's] 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." *Id.* The aim of litigation is to ascertain objectively the very truth of a dispute without reference to extraneous or ulterior considerations. *Id.*

The prosecutor's references to race, ethnicity and nationality in this case were improper. They inappropriately injected race into the closing argument. Even though race may have been unavoidably entangled in the factual setting of the case, attorneys must vigilantly strive to handle the issue as objectively as possible so as not to arouse animosity toward any individual on account of race. *State v. Hollins*, 253 N.W.2d 597, 600 (Iowa 1977). This was not done. There is no objectivity in labeling an individual by his or her race. Moreover, racial labeling does not become objective by attributing the labeling to a witness. Witnesses are not charged with the same duty as a prosecutor. The prosecutor's use of race as a tool for identification amounted to misconduct under the circumstances of this case.

We next consider whether the prosecutor's misconduct prejudiced Herrarte. In determining whether prosecutorial impropriety provides the basis of reversal, we consider the following factors:

> (1) Whether the prosecutor's remarks were made in response to defense counsel's argument to the jury;
> (2) Whether the prosecutor's conduct was isolated and/ or deliberate;

> (3) Whether the trial court gave a curative instruction and, if so, whether this was strong and explicit enough to overcome any surviving prejudice that would affect the outcome of the trial.

Blanks, 479 N.W.2d at 604.

We have previously recognized the trial court condemned the racial references made by the prosecutor. The court's curative instruction was extraordinarily stern and explicitly described the prosecutorial conduct the jury was not to consider. We believe this strong curative instruction was sufficient to correct any erroneous views in the mind of the jury which may have resulted from the prosecutorial impropriety. We also find no evidence the misconduct was deliberate. Herrarte was not prejudiced.

Herrarte next complains an overlay the prosecutor inadvertently displayed to the jury during closing argument constituted prejudicial prosecutorial misconduct. The overlay stated: "Innocent People Don't Lie." The prosecutor decided not to use the overlay after the court instructed him to refrain from suggesting any such inferences from the testimony. However, when the prosecutor reached the point in his closing argument where he was prepared to use his next overlay, he switched the projector on and the "Innocent People Don't Lie" overlay was visible for the length of time it took him to remove it, a matter of seconds. The prosecutor indicated to the trial court that it was shown to the jury unintentionally.

Assuming arguendo the statement "Innocent People Don't Lie" constitutes misconduct when conveyed by a prosecutor to the jury during closing argument, we

find the misconduct did not prejudice Herrarte. After the trial court determined some of the jurors had seen the overlay, it noted:

> That comment and it is -- since --since some of you saw it, I'll tell you what it was so -- because this is the most upsetting thing of all is that the comment is "innocent people don't lie."
>
> That comment is improper. You are to completely disregard it. And you are to give no effect to it whatsoever ever. It's a saying. It has no basis in fact. And it is not part of the evidence, so do not give it any consideration.

We find the curative instruction removed the potential for prejudice.

Herrarte further alleges the prosecutor improperly referred to him as "deceptive." When discussing Herrarte's testimony during his closing argument, the prosecutor stated:

> Again, I think [Herrarte's "loud" and "obnoxious behavior"] tells a little bit about Cesar Herrarte. Because he, I submit Ladies and Gentlemen, through this entire trial is the person who is most trying to hide who he is. Or to say it another way, he is the person who is, I believe and submit, most deceptive.

Herrarte had the duty to object at the time of argument to offensive or improper remarks made by the prosecutor in closing arguments, and without an objection he waived his right to complain about the remarks in a motion for new trial or on appeal. *State v. Love*, 302 N.W.2d 115, 121 (Iowa 1981). Herrarte failed to preserve error on this issue. Notwithstanding, even if Herrarte preserved error, the prosecutor's description of Herrarte's testimony as deceptive did not rise to the level of prosecutorial misconduct. *See State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983).

Herrarte's fourth claim of misconduct was the prosecution's reference to the defense of intoxication amounted to an expression of personal belief. Herrarte requested and received an instruction on his intoxication defense by the trial court. In reviewing this instruction during the closing argument the prosecutor noted:

> They have raised another defense and I want to talk about that very briefly. It is an intoxication defense and it deals with the specific intent element.
>
> Every time one of the elements require that the State prove the defendants specifically intended to do something, the defendants argue that they couldn't do that. They didn't have that specific intent because they were intoxicated.
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> This sentence [as the prosecutor pointed to the instruction on the overhead] sets out the main rule. Even if a person is under the influence of intoxicants, he's responsible for his acts if he had a sufficient mental capacity to form the specific intent necessary to do the crime charged.
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> ***
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> Intoxication is a defense only when it causes mental disability which makes the person incapable of forming the specific intent. I submit to you, Ladies and Gentlemen, that *one needs to be awfully intoxicated before one doesn't have a clue as to what he or she is doing.*

(Emphasis added.)

Again, assuming arguendo this comment was an unsupported expression of personal belief, no prejudice resulted. There was testimony Herrarte drank extensively on the evening of the stabbing. There was also testimony he vomited and was unconsciousness. Thus, even if the prosecutor's comment was construed to suggest a certain level of intoxication was needed before the defense was applicable,

there was evidence Herrarte's level of intoxication was very high. Furthermore, the trial court instructed the jury in response to the prosecutor's comment:

> There is nothing in the evidence that supports such a comment, and the comment is to be disregarded. And you are not to consider it in your determination in this case.

This admonition was sufficient to remove any possible prejudice that might have arisen from the prosecutor's comment.

Finally, Herrarte argues the prosecutor improperly characterized the testimony of some witnesses by insinuating a witness involved in the fight used drugs just prior to the fight. After considering the prosecutor's comments we find there was no misconduct.[2]

Mindful of our standard of review, we are convinced the prosecutor's misconduct did not contribute to Herrarte's convictions. "It is axiomatic that a trial

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[2]You remember the first bedroom, Ladies and Gentlemen, is the one down here. This is Mark Salzer's bedroom (indicating). He looks in there. And while he is in there, Guillermo Escobedo comes in and clearly asks him this: "where is the marijuana? Where is the pipe? Where is the marijuana pipe."

There was marijuana in the house somewhere Mark Salzer knew it was there. He was going to try to find it and give it to Guillermo Escobedo because Mr. Escobedo obviously wanted to consume the marijuana. They couldn't find it, however.

I'm not sure about the testimony of where Mr. Salzer went. I believe he went into some other areas of the room to look for -- of the house rather, to look for his checkbook. He didn't find it.

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However, the implication that was raised to the other people that were there, particularly Jeff Schurman, was that when they came out of the bedroom, when Memo, when Mr. Escobedo and Mark Salzer came out of this bedroom, apparently Mr. Salzer was kind of rubbing his nose and sniffing.

You may have noticed his testimony when he was on the stand here before you towards the end of his testimony. He began to sniff too. No doubt an allergy problem. But he did something similar that night.

court is better equipped than appellate courts can be to determine whether prejudice occurs." *Anderson*, 448 N.W.2d at 34. This is because the trial court has the opportunity to observe firsthand both the alleged misconduct and any jury reaction to it. *Id.* We conclude the trial court did not abuse its discretion in finding the prosecutor's actions, singly or together, did not support a mistrial.

II. Ineffective Assistance

We generally reserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Ueding*, 400 N.W.2d 550, 553 (Iowa 1987). This allows counsel an opportunity to fully respond to claims. *State v. Massick*, 511 N.W.2d 384, 389 (Iowa 1994).

We conclude Herrarte's claim of ineffective assistance of counsel should be preserved for postconviction proceeding. The present record fails to fully present the issues raised, and it would be helpful to permit trial counsel to respond to the claim.

III. Conclusion

We affirm the conviction and preserve the claim of ineffective assistance of counsel for postconviction proceedings.

AFFIRMED.