IN THE COURT OF APPEALS OF IOWA

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No. 8-015 / 97-0162

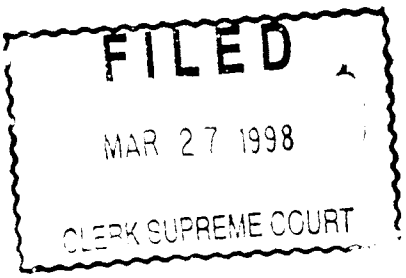
STATE OF IOWA,

Plaintiff-Appellee,

vs.

CEDRIC BERTRON THEUS,

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from the judgment and sentences entered, following a jury trial, of going armed with intent, reckless use of a firearm causing serious injury, assault while participating in a felony causing serious injury, and first-degree murder.

AFFIRMED.

Craig H. Lane, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Mahan, JJ.

SACKETT, J.

Defendant-appellant Cedric Bertron Theus appeals from the judgment and sentences entered, following a jury trial, of going armed with intent, reckless use of a firearm causing serious injury, assault while participating in a felony causing serious injury, and first-degree murder. Defendant contends the charges should be dismissed and the court erred in denying his motion for judgment of acquittal because there was insufficient evidence to support the convictions. Defendant contends at the least he should have a new trial because: (1) the trial court erred in permitting a character witness to testify for the State; (2) the trial court erred in admitting autopsy photographs; (3) there was juror misconduct; (4) there was prosecutorial misconduct; (5) he had newly-discovered evidence; and (6) his trial counsel was not effective. We affirm.

Defendant was charged after he allegedly shot Terrance Gibson four times, twice in the back, once in the shoulder, and once in the chest. Defendant initially admitted shooting Gibson, but claimed it was done in self-defense.

The events occurred after Aaron Wiggins made advances toward defendant's girlfriend, Natasha Drappeaux. Defendant and Wiggins were ready to fight when Gibson intervened. Defendant and Gibson struggled over a gun. Gibson fled and defendant ran after him. Gibson was shot. The gun was never recovered.

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Defendant contends his motion for acquittal should have been sustained and there is insufficient evidence to convict him because his conduct in shooting Gibson was justified.

The defense of self-defense is statutorily denominated as a defense of justification. *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). The defense is codified in Iowa Code section 704.3, which provides, "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." *Id.* The State is required to prove beyond a reasonable doubt the defendant was not acting in self-defense. *State v. Sharkey*, 311 N.W.2d 68, 72 (Iowa 1981).

Due process requires the State prove all elements of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 315-16, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979). The jury is not, however, required to accept the defendant's version of the facts. *State v. Pletka*, 310 N.W.2d 525, 527 (Iowa 1981); *State v. Hall*, 214 N.W.2d 205, 210 (Iowa 1974).

The evidence at trial showed defendant admitted shooting Gibson four times and in the process putting a bullet through his heart. There was evidence defendant had told Wiggins, the person Gibson sought to protect, he was going to kill him. There was evidence to support a finding defendant started the incident, had no reason to believe he was in imminent danger of death or injury, and did not have grounds to

believe the force he used was reasonable. There was substantial evidence to prove defendant's guilt beyond a reasonable doubt. *See State v. Thornton*, 498 N.W.2d 670, 673-74 (Iowa 1993). We affirm on this issue.

Defendant contends the trial court abused its discretion in admitting a number of pictures of Gibson taken during the autopsy. Defendant argues Dr. Bennett could have explained the injuries without the pictures. Defendant further advances certain of the photographs were duplicates.

The admissibility of the photographs was a matter within the discretion of the trial court. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). The photographs were admitted to illustrate the testimony of Bennett. They were relevant and the trial court did not abuse its discretion in determining the probative value outweighed the prejudicial effect. *See State v. Fetters*, 562 N.W.2d 770, 778 (Iowa App. 1997). We affirm on this issue.

Defendant next contends there was juror misconduct because a witness for the State, Carmen Clay, was seen talking to a juror on the case for about fifteen seconds. Defendant advances it appeared the witness and the juror knew each other. A friend of defendant's family testified at a hearing on defendant's motion for a new trial he saw the witness having a brief conversation with a juror in the hall during a recess. The friend testified he told defendant about it the day it happened.

The trial court, in ruling on defendant's motion for a new trial, found the friend not to be a credible witness and concluded there was no credible evidence of any

juror misconduct. The juror spoken to was never identified. The trial court found the conversation unlikely given the layout of the courthouse. Carmen Clay was not called to verify the exchange. We agree with the trial court defendant has failed on this issue. There is insufficient evidence of any act of misconduct reasonably probable to influence the jury. *See State v. Arnold*, 543 N.W.2d 600, 605 (Iowa 1996).

Defendant next contends the State should not have been allowed to admit the testimony of Stephanie Johnson indicating defendant assaulted two women on two separate occasions. The State sought to admit the testimony to rebut evidence of defendant's character elicited when defendant questioned Carmen Clay. Clay was asked:

> Q. Do you believe based upon [defendant's] reputation among the people who know him that Cedric is a violent person? A. No.

Defendant offered evidence he was not a violent person. The prosecution was justified then in offering a character trait of defendant rebutting this evidence. *See* Iowa R. Evid. 404(a)(1). There is no error here.

Defendant next contends Natasha, his girlfriend at the time of the incident and now his wife, fired the shots that killed Gibson. Defendant first raised this in a motion for new trial contending it was newly-discovered evidence. He argues though he knew the fact at the time, it is new evidence because only now will Natasha admit to having done so. He contends he had been sure he would be acquitted because the tests would show he had not fired the gun.

The district court has wide discretion in ruling on a motion for a new trial based upon newly-discovered evidence, and this court will uphold the district court's ruling if not clearly erroneous. *State v. Jones*, 511 N.W.2d 400, 409 (Iowa App. 1993). To prevail on a motion for a new trial based on newly-discovered evidence, defendant must prove: (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *State v. Adamson*, 542 N.W.2d 12, 13 (Iowa App. 1995). Defendant knew who shot Gibson when it happened. Defendant has not proved the evidence was discovered after the verdict. We agree with the trial court defendant has failed on this issue.

Defendant next contends the trial court further erred in overruling his motion for new trial based on claims of prejudicial misconduct by the prosecuting attorney. Defendant complains the following remarks, set forth in the context in which they were made, were both improper and prejudicial:

> Defendant's story about [Gibson] producing the gun out of nowhere and threatening to kill the defendant is absolutely unbelievable.
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> . . . .
>
> The defendant used a gun on an unarmed man. The unarmed man had not struck the defendant even once. The defendant chased down his unarmed victim and shot him in the back. *It is ridiculous to claim self-defense under those facts.* (Emphasis added.)

Defendant contends the prosecutor, in making these remarks, referred both to defendant's decision not to testify as well as expressing his own personal belief or opinion as to the truth or falsity of the statements defendant made to the police, which statements were played for the jury.

The State contends error was not preserved on this issue because the objection was not made during the arguments; rather, it was made in the motion for new trial, and the statements, when considered in the context made, were not improper.

The Iowa Code of Professional Responsibility for Lawyers DR 7-106(C) provides, in applicable part:

> In appearing in his [or her] professional capacity before a tribunal, a lawyer shall not:
>
> . . . .
>
> (4) Assert his [or her] personal opinion as to the justness of a cause, . . . or as to the guilt or innocence of any accused; but he [or she] may argue, on his [or her] analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

It is misconduct for counsel to create evidence by argument or express a personal belief regarding defendant's guilt. *State v. TeBockhorst*, 305 N.W.2d 705, 709 (Iowa 1981); *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). An attorney's expression of a personal belief that is not stated as a reasonable inference from the record is barred because such a statement is a form of "unsworn, unchecked testimony and tends to exploit the influence of [the prosecutor's] office and undermine the objective detachment which should separate a lawyer from the cause for which he or

she argues." *See State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983) (citing *ABA Standards, The Prosecution Function*).

In closing argument it is permissible to analyze the evidence in argument. *State v. Poppe*, 499 N.W.2d 315, 318 (Iowa App. 1993). While the prosecuting attorney's statement could be interpreted as one making his own suggestion defendant's story was unbelievable, it also can be interpreted to mean the prosecutor was arguing certain evidence showed defendant's story unbelievable. Furthermore, while the prosecutor's remark "it is ridiculous to claim self-defense under those facts" could possibly be understood as putting some burden on defendant, we must take this and the other statement in context. The prosecutor might have chosen his words more carefully. Yet, we fail to find either statement such as would be clearly understood either as the prosecutor's comment on defendant's guilt or his failure to testify. *See State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983). We do not find the remarks sufficiently prejudicial to require reversal.

Defendant next contends his trial counsel was not effective in a number of particulars.

To gain relief on a claim of ineffective assistance of counsel, a convicted person must prove both a breach of an essential duty and prejudice. *See Morgan v. State*, 469 N.W.2d 419, 426 (Iowa 1991); *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). To show a breach of an essential duty by his trial counsel, defendant

must show the lawyer's performance was outside the range of normal competency. *See Pettes v. State*, 418 N.W.2d 53, 56 (Iowa 1988). If a breach of an essential duty has been shown, defendant must also be able to prove prejudice in that the outcome of the trial would have been different if not for counsel's breach of an essential duty.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings so that a more complete record may be developed on various issues. *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997). "However, they may be resolved on direct appeal when the record adequately addresses the issues." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). Defendant contends there are a number of reasons which, when taken together, prove his claim of ineffective assistance of counsel. He fails to state the reasons in his brief, but refers us to trial court filings. Though the issues should have been included in the brief, we have examined them carefully and find most of them to be without merit. The only claim we are unable to determine on direct appeal is the issue of counsel's ineffectiveness for failing to pursue the gun residue test results. The record on this issue is insufficient and defendant must present this claim in an application for postconviction relief to permit a full development of the record and to give defendant's counsel an opportunity to explain his decisions. We therefore preserve the claim of ineffective assistance of counsel as it relates to the issue of the gun residue test results for later postconviction relief proceedings.

AFFIRMED.