IN THE COURT OF APPEALS OF IOWA

No. 1-696 / 10-0586
Filed November 9, 2011

STEPHEN SEMPEK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Paul R. Huscher, Judge.

Sempek appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Margaret Popp Reyes, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Steven Sempek appeals the district court's dismissal of his application for postconviction relief (PCR). Sempek argues defense counsel was ineffective regarding: (1) prosecutorial misconduct during rebuttal closing argument and (2) a failure to appeal the sentence imposed at his third sentencing on multiple counts of second-degree sexual abuse. We affirm.

I. Background—Criminal Case and Appeal.

Because Sempek alleges he was prejudiced due to prosecutorial misconduct and "none of the witnesses corroborated that Mr. Sempek sexually abused the victims" and "the identity of the abuser relied entirely upon the testimony of the victims which was not corroborated," we set forth the facts leading to his convictions. Between October 1997 and November 1998, Sempek took brothers C.V. and Z.V. shopping, to the park, out to eat, camping, and fishing. J.M. and his younger brother, T.M., were included on several of the outings. In March 2005, the State charged Sempek with nine counts of second-degree sexual abuse (child under the age of twelve) for assaulting C.V. and Z.V.

At the September 2005 trial, C.V. and Z.V. each described the varied and numerous sexual acts initiated by Sempek during camping trips and at a friend's house where Sempek was also living. C.V. testified he is now in counseling. Z.V. testified he did not tell anyone at the time because, as a nine-year-old, he believed Sempek's threats of violence. Z.V. testified he is in counseling.

The victims' testimony was corroborated by the testimony of J.M. and T.M. J.M. testified:

> Q. Do you ever recall seeing Steven Sempek go anywhere with [Z.V.] alone? A. Yes.
>
> Q. What would you see? A. He'd usually take him back to the tent by himself while we was fishing.
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> Q. What time of the day would this be? A. Usually around—not night but dusk.
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> Q. Would you ever see him do anything like that with [C.V.]? A. Yes.
>
> Q. Same type of a thing, take him into the tent? A. Yeah.
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> Q. Do you remember what year this was? A. It went for a while.
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> Q. Do you remember how old you were? A. It started when I was about [eight].
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> . . . .
>
> Q. How old are you now? A. Twenty.
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> . . . .
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> Q. Did you ever see Steven Sempek do anything else that was unusual with you and the boys? A. When we was driving, like he'd let us drive around the lake—not by ourselves, but he'd sit us on his lap, and he would put his hands on our laps.
>
> Q. . . . [Y]ou'd see him do that to who? A. To all of us.

T.M. (age fourteen at trial) testified he "basically grew up playing with" the victims. T.M. stated:

> Q. How did you see this? A. Because both the tents are window flaps that we left open at night so air could get in so we didn't get too hot, and I looked out our window flap into theirs and seen it.
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> . . . .
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> Q. When you woke up, what did you do? A. I looked out the window toward the other tent.
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> Q. What did you see? A. I seen Steve touching Z.V. in inappropriate areas, in his private areas.
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> Q. Can you tell what private area it was? A. Between his legs.
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> Q. What was he touching his private area with? A. His hands.
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> . . . .
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> Q. Did you just see that on one occasion? A. Yeah—actually no, a couple times at Arrowhead.

Dr. Fernandez, a general psychiatrist, testified sexual abuse can be a traumatic event causing post-traumatic stress disorder. In April 2005, Dr. Fernandez interviewed C.V. upon his admission to the hospital:

> The story [C.V.] told me was that when he was ten-years-old, he was molested by an alleged family friend . . . . [C.V.] only disclosed this a year earlier, and he had been having classic symptoms of Post-traumatic Stress Disorder which recently had accelerated.
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> . . . .
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> Q. Doctor, actually did he give you some symptoms, complaints about how he was feeling? A. Yes. He had been hearing voices and had been having flashbacks of the event that occurred at that time, and he's been having temper outbursts. . . .
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> He started hearing . . . the voice of this man called Steve who had molested him that scared him so much that he was screaming uncontrollably and was going into a rage. His mother decided to bring him in for admission to stabilize him . . . .
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> . . . .
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> Q. How about problems functioning or fear, Doctor? Did he make those complaints? A. He was very, very fearful. He was . . . very frightened and scared. He was having a lot of flashbacks intermittently. He keeps hearing this voice every now and then threatening him, which bothers him. He had been having homicidal thoughts toward this person who had molested him.

The State also called Dr. Murthy, a child psychiatrist. In August 2002, Dr. Murthy interviewed Z.V., took a history, and prescribed treatment. At that time, Z.V. had no past psychiatric history. Dr. Murthy testified:

> He came in with his mother stating that he's getting up in the middle of the night getting flashbacks, fearful, impulsive, angry, [and] worrying about things that happened in the past. Initially was very guarded to tell what has happened. So after calming down, when he was nine-years-old, went to camp with a person age thirty-three, inappropriately touched him, so this was a recurrent dream of touching . . . .
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> . . . .
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> Q. So you feel he has Post-traumatic Stress Disorder? A. Yes, that's right.
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> . . . .
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> Q. What was the traumatic event that he reported to you? A. What he said, that four years ago when he went to camp . . . at

> night he was sleeping and somebody touched him. That person is a thirty-three year-old person.

At the close of the State's case, the court granted Sempek's motion for a directed verdict on two of the nine counts. Sempek testified at trial and denied touching either victim in sexually-inappropriate ways.

The closing arguments were not recorded. At some point, defense counsel moved for a mistrial. Defense counsel's motion and the court's denial of the motion were not recorded. The jury found Sempek guilty on all seven counts.

On November 8, 2005, the court conducted a hearing on Sempek's motion for a new trial. Defense counsel argued:

> [W]e would ask the Court to rule . . . it did err in overruling the defendant's motion for a mistrial, as the Court was also the trial court judge, knows what happened.
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> . . . [T]he prosecution engaged in what was clearly inflammatory closing argument done for the sole purpose and for no other purpose than to inflame the jury against [Sempek] by personal insults, by derogatory comments. The comment exactly was: "You know why he did it. He does it because he likes little boys."
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> There was an immediate motion for mistrial. That motion was overruled. We feel that that particular statement and those comments by the prosecuting attorney during closing prejudiced the jury against [Sempek], not because of what he did but because of statements made about what he may or may not have liked.

At this hearing, the State argued:

> [T]he State is just going to reiterate that the comments and the issues that the defense has raised have already been raised at the close of the case, particularly in regards to the closing arguments.
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> First of all, the State would assert that the allegations of what was said during closing arguments was not what was said during closing arguments; and the Court had addressed that and ruled on that issue at the time right after the closing arguments were made.
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> . . . .

> In addition, the State's comments that [Sempek] likes little boys in closing arguments wasn't inflammatory. It was a comment that was substantiated by what the victims testified to.

The court denied the motion for new trial, ruling: "The court addressed these issues already, and I'll stand by those previous rulings." The court then conducted the sentencing hearing. After doubling each term based on Sempek's "admission of a prior sexual abuse conviction,"[1] the court ordered terms not to exceed fifty years on each of the seven counts. The court also ordered two counts "to run consecutive with each other for a total of 100 years, and the remaining counts shall run concurrent." The court gave the reasons for its sentence on the record.

On November 21, 2005, after hearing, the court granted Sempek's application to review sentence and corrected and replaced its original sentence. The court ruled "it's somewhat unclear from the statute whether or not the enhancement would apply in this situation" and ordered Sempek to serve a term not to exceed twenty-five years on each of the seven counts. The court ran four counts consecutively, for a term not to exceed 100 years, with the remaining three counts running concurrently. "The reason[s] for the Court's sentence are those as stated on the record at the time of sentencing on November 8, 2005."

Sempek appealed arguing the evidence was insufficient to support his conviction on count II. The State conceded the record did not support a conviction on count II. On December 11, 2006, the Iowa Supreme Court summarily reversed the count II conviction and affirmed the remaining

[1] In August 2000, Sempek was sentenced to prison for third-degree sexual abuse. In January 2005, Sempek was released.

convictions. The court remanded for entry of judgment "for the remaining six counts of second-degree sexual abuse and for resentencing without regard to count II."

On February 26, 2007, the judge who had presided at trial and at both of the previous sentencing hearings conducted the post-remand sentencing hearing. Sempek argued his sentence after remand "should be the equivalent of no more than seventy-five years." The court removed count II and ordered terms not to exceed twenty-five years on each of the remaining six counts. The court ordered four counts "run consecutively, one to the other, for a total of 100 years" and ordered two counts to "run concurrently with Count I."

Sempek did not appeal this sentence.

II. Background—Postconviction Case.

In October 2007, Sempek filed an application for PCR. In April 2008, Sempek's amended application for PCR alleged ineffective assistance of counsel:

> (1) Trial Counsel and Appellate Counsel failed to object and appeal the issue of prosecutorial misconduct; and (2) Appellate Counsel failed to raise an abuse of discretion argument as to the sentencing of Mr. Sempek.

The PCR issues were submitted by depositions of the attorneys, an investigator, and a juror, and the parties' stipulation of facts.

In determining whether defense counsel was ineffective, the PCR court first addressed whether the statements during rebuttal closing argument that Sempek "likes little boys" (admittedly made) and the *alleged* statement that

Sempek needed to be convicted "to protect innocent children" (denied by the State) constituted prosecutorial misconduct. The PCR court ruled:

> In order to succeed on a claim of prosecutorial misconduct, Mr. Sempek must show (1) proof of actual misconduct by the prosecutor and (2) that the misconduct resulted in prejudice to the defendant preventing him from receiving a fair trial. . . .
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> As noted above, closing arguments were not recorded at trial. Mr. Sempek argues that the statements were misconduct on the prosecutor's part because they were disparaging toward him, would inflame the jury, and could have caused the jury to view [the statements] as evidence of the defendant's guilt. . . .
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> . . . .
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> The testimony of the [PCR] witnesses does not support Mr. Sempek's claim of misconduct. He has failed to meet his burden of proof. . . .
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> Even if misconduct had been proven, Mr. Sempek must satisfy the second requirement . . . the misconduct resulted in prejudice, denying the defendant a fair trial. In [*State v.*] *Graves*, [668 N.W.2d 860, 877 (Iowa 2003)] the Iowa Supreme Court used a five-factor test to determine whether the prosecutorial misconduct resulted in prejudice. . . .
>
> The significance of the alleged misconduct to the central issues in the case is not as great as it was in *Graves*. . . . In the present case, the alleged misconduct, that the prosecutor referred to Mr. Sempek as liking little boys and about the need to protect the community, are not as significant. Unlike *Graves*, the State had other evidence to support its case against Mr. Sempek. The victims testified to the sexual abuse committed by Mr. Sempek and their testimony was corroborated by other witnesses.
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> The next factor to consider is the strength of the State's evidence. . . . In the present case, the State presented testimony from the two victims at the trial and their testimony was corroborated by other witnesses. The strength of the State's case did not hinge upon the statements allegedly made by the prosecutor.
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> . . . .
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> Finally, the court must consider whether the misconduct was invited and examine the pervasiveness and severity of the misconduct. . . . . In the present case, there is no evidence that the defense invited the conduct, but there is also no evidence of a pervasive theme throughout the trial as there was in *Graves*. [*Id*. at 880-81.] If the statements were made by the prosecutor . . . and were misconduct, they were isolated statements and not a part of a pervasive theme.

> This Court finds that there is not sufficient evidence to prove prejudice by prosecutorial misconduct. If the statements were made, the testimony supports the conclusion that the statements were not made in the context alleged by Mr. Sempek. Even if the statements were sufficient to establish misconduct . . . the misconduct did not cause prejudice or deny Mr. Sempek a fair trial.
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> Because Mr. Sempek has been unable to establish prosecutorial misconduct or prejudice resulting therefrom, his counsel was not ineffective for failing to raise the issue on appeal.

Second, the PCR court resolved Sempek's claim his defense counsel was ineffective for not appealing his resentencing. Sempek argued the trial court abused its discretion because there was one less count for the court to consider, but he was still sentenced to a total of 100 years. The PCR court ruled Sempek's "claim that the trial court abused its discretion in sentencing him to 100 years, the same as the previous sentence, fails."

Alternatively, the PCR court ruled Sempek did not prove the prejudice element of his ineffective assistance of counsel claim based on sentencing: "Mr. Sempek has not demonstrated how the outcome would have differed if the issue had been raised. The trial court considered the serious nature of the six remaining counts that Mr. Sempek was convicted of, and sentenced him accordingly."

Sempek appeals the PCR court's denial of postconviction relief.

III. Standard of Review.

We review the totality of relevant circumstances de novo on constitutionally-based ineffective assistance of counsel claims. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). Sempek must establish two elements "to show the ineffectiveness of defense counsel": (1) counsel "failed to perform an

essential duty; and (2) this omission resulted in prejudice. [His] inability to prove either element is fatal." *Graves*, 668 N.W.2d at 869.

IV. Ineffective Assistance of Counsel—Prosecutorial Misconduct.

Sempek contends inaction by his trial and appellate counsel on the issue of prosecutorial misconduct constitutes ineffective assistance of counsel. In determining whether Sempek asserts a meritorious ineffective-assistance-of-counsel claim, we must first determine whether Sempek has proven a duty upon his defense counsel to act grounded upon a meritorious prosecutorial misconduct claim.

"To prevail on a matter of prosecutorial misconduct, [Sempek] must show both the misconduct and that he was prejudiced by it." *State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985). A prosecutor's misconduct does not warrant relief 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).

Sempek's trial counsel's motion for a mistrial and motion for a new trial based on prosecutorial misconduct were denied by the trial court. Accordingly, Sempek's trial counsel did take action on this issue and Sempek has failed to show a breach of duty by trial counsel constituting ineffective assistance.

Regarding appellate counsel's failure to appeal this issue, Sempek argues a review of the whole record shows *both* statements ("likes little boys" and "protect innocent children") were made by the prosecutor and these statements constitute actual misconduct. We assume, without deciding, the prosecutor's statements on rebuttal constitute misconduct.

Regarding the second element of a prosecutorial misconduct claim, Sempek contends he was prejudiced because (1) the prosecutor's statements do "not have to be a theme or pervasive in order to prejudice a defendant" and (2) defense counsel had no opportunity to respond to rebuttal statements, therefore "the impact of these comments was therefore just as great as if they were constantly repeated during the State's case-in-chief as part of a theme."

In determining whether prejudice resulted from the prosecutor's rebuttal argument, "we . . . consider whether the effect of the misconduct . . . was pervasive enough to undermine confidence in the verdict." *Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005). Sempek must prove: "[T]here is reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict [Sempek] for reasons other than the evidence introduced at trial and the law as contained in the court's instructions." *See Graves*, 668 N.W.2d at 877. "The most important factor under the test for prejudice is the strength of the State's case." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). "Clearly, the stronger the case against the defendant, the less likely the jury is to look beyond the record." *Id*.

In determining whether the prosecutor's conduct was prejudicial, "we must examine the entire record." *Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006). We view the statements of the prosecutor in the context of the entire trial. *Anderson*, 448 N.W.2d at 33. "Prejudice can, but usually does not, result from isolated prosecutorial misconduct." *Id. a*t 34. "Ordinarily a finding of prejudice results from [p]ersistent efforts to inject prejudicial matter before the jury." *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976).

As the State points out, the evidence of Sempek's guilt was overwhelming. In addition to each victim specifically detailing the numerous and varied sexual assaults inflicted by Sempek when the victims were young boys, the State presented four corroborating witnesses. When viewed in the context of the entire trial, two isolated statements during rebuttal argument do not constitute misconduct so severe or pervasive that it deprived Sempek of a fair trial. Therefore, Sempek cannot establish prejudice, the second element of a prosecutorial misconduct claim.

Accordingly, any inaction on the part of Sempek's appellate counsel does not constitute a breach of an essential duty because "counsel has no duty to raise an issue that has no merit." *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

V. Ineffective Assistance of Counsel—Sentencing.

Sempek argues defense counsel was ineffective in failing to appeal his post-remand sentence as an abuse of the court's sentencing discretion. Sempek's PCR petition asserts ineffective assistance of appellate counsel. However, Mr. Gaul was Sempek's trial counsel at sentencing and, because no appeal was taken, there is no appellate counsel on this issue. We therefore consider whether Gaul, as trial counsel, had a duty to appeal the sentence imposed following remand. At his deposition, Gaul testified he had no independent recollection of the February 2007 resentencing, but he had reviewed the transcripts. Gaul explained:

> And if your other question is, did the judge abuse his discretion . . . he was within his discretionary rights to sentence Mr. Sempek up to the complete maximum. Certainly the sentence was

> very long. Certainly, that's where it stayed at, even though one of the convictions . . . was thrown out, and it stayed 100 years. . . . The judge had discretion to max him, to give him the absolute max [150 years]. The judge didn't do that, but did give him a very long sentence of 100 years and essentially stayed at that sentence. In my opinion . . . I don't think that rises to abuse of discretion . . . .
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> . . . .
>
> A. No. I don't file an appeal unless the Defendant tells me to file the appeal. . . . [I]t is possible that by filing an appeal, you make the situation worse for your client. . . . I have had a case . . . where we appealed a sentence. It was remanded . . . and it got worse. Then we appealed the worse sentence and it was affirmed. So . . . I learned my lesson from that. I don't file an appeal unless I'm told to file an appeal.

We note the judge who presided over the trial also presided over the original sentencing proceeding and the two resentencing proceedings. In the resentencing proceedings, the court essentially adopted its stated reasons from the original sentencing record, albeit in more abbreviated form. Because the court on remand imposed a virtually identical sentence, we conclude under the particular circumstances of this case, we may also examine the district court's stated reasons for the original sentence.

At the original sentencing hearing, the court stated on the record:

> I do need to notify you . . . the reason for my sentence and particularly the need for the Court imposing consecutive sentences on two of those counts [100 years], those reasons are several.
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> First of all, because of the very nature of the offenses, the fact that they were done to victims in a violent manner in some instances, that your victims were young and just the general nature of those offenses.
>
> I also paid particular attention to your presentence investigation. You have prior offenses and even considering the fact that these offenses that you've just been sentenced on occurred approximately seven years ago, you still need to be punished for those crimes. I'm also particularly disturbed with the psychosexual evaluation and the results and evaluation that came from that. I note that your presentence investigation notes that based on that psychosexual evaluation, you're considered to be in

> the maximum risk range for child molestation and sexual assault behavior.
>
> Another reason for my consecutive sentence [is] the fact that you have two victims, and each one of those victims involved distinct and separate offenses and ones that you are being sentenced on today.

Fourteen days later, at the second sentencing hearing, the court removed the sentencing enhancement, again sentenced Sempek to 100 years by running four terms consecutively and three terms concurrently, and stated: "The reason[s] for the Court's sentence are those as stated on the record at the time of sentencing on November 8, 2005."

On the remanded resentencing with one count dismissed, the court sentenced Sempek on the six remaining counts (still involving two victims), and ordered four consecutive terms and two concurrent terms. The court explained:

> The reason for my sentence is the fact that these are very serious offenses. You've got some victims to these serious crimes, and the Court feels that consecutive sentences totaling 100 years [are] appropriate under the circumstances.

Iowa Rule of Criminal Procedure 2.23(3)(*d*) provides: "The court shall state on the record its reason for selecting the particular sentence." The Iowa Supreme Court has explained: "A sentencing court's statement of its reasons satisfies the rule if it recites the reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed." *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992).

We conclude the district court's sentencing of Sempek meets this standard and did not amount to an abuse of discretion. Accordingly, any inaction after sentencing on the part of Gaul, the counsel at sentencing, does not constitute a

breach of duty because "counsel has no duty to raise an issue that has no merit." *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

AFFIRMED.