

IN THE COURT OF APPEALS OF IOWA

No. 8-757 / 07-1072
Filed December 31, 2008

DAMON CALAWAY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Honorable Arthur E. Gamble, Judge.

Damon Calaway appeals a ruling denying his application for postconviction relief for ineffective assistance of counsel after his conviction of murder in the first degree and kidnapping in the first degree. **AFFIRMED.**

Jeffrey Mains, Des Moines, for appellant.

Damon Calaway, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph Weeg, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

PER CURIAM

Damon Calaway appeals a ruling denying his application for postconviction relief for ineffective assistance of counsel after his conviction of murder in the first degree and kidnapping in the first degree. He contends that his counsel was ineffective for (1) failing to ask for a mistrial after alleged prosecutorial misconduct; (2) failing to ask for a mistrial after evidence of prior bad acts was disclosed; (3) failing to retain a DNA expert for trial; and (4) failing to assert a compulsion defense. We affirm.

I. Background Information and Prior Proceedings

Damon Calaway was a member of the organized criminal street gang the “Crips.” A fellow Crips gang member, Raphael Robinson, was murdered and Dawue Stigler, a rival gang member, was rumored to have committed the crime. At a meeting in Cheatom Park, a Crips leader enlisted fellow members to “hit” Stigler; Larry Botts volunteered, and Calaway was present.

Shauntelle Brown, the girlfriend of Botts, and live-in babysitter for some of Calaway’s siblings, testified that in August 1996, Calaway and three other men went to the basement with Stigler. She heard fighting, objects breaking, and observed Botts go to the basement with a shotgun. All of the individuals returned upstairs a couple hours later, except Stigler. The next day, she was instructed to clean blood from the basement. She testified that Calaway told her that he had beaten someone in the basement and shot someone in the head. She further testified that Botts revealed that they “took him to the cornfield, and they killed him” She testified that Botts was wearing a ring belonging to Stigler, and Botts had given her a bracelet that also belonged to Stigler, which she threw

away. Joseph Robinson testified that Calaway told him that he picked up Stigler on the night in question, lured him to his house to “smoke a blunt,” then beat him, took him to a cornfield, and shot him. Charles Tucker testified that he also heard Calaway describe the beating and shooting of Stigler.

In September 1996, the body of an African American youth was discovered in a cornfield near Indianola. The remains revealed four gunshot wounds, three to the back of the head, one to the ribs. A pair of Fila shoes, a ring, and an earring were found nearby; all later identified to have belonged to Stigler. DNA samples from a bone were compared to DNA from Stigler’s parents and revealed a 99.5% chance that they were the parents of the found youth.

A jury convicted Calaway of murder in the first degree and kidnapping in the first degree. He was sentenced to two consecutive life terms without parole. On direct appeal, this court affirmed his conviction and found no ineffective assistance of counsel on the claims then raised. *State v. Calaway*, No. 99-0258 (Iowa Ct. App. March 15, 2000). In a postconviction relief proceeding, the district court denied Calaway’s additional claims of his trial and appellate counsel’s ineffectiveness. Calaway appeals.

II. Standard of Review

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Calaway must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice defendant must show there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

III. Prosecutorial Misconduct

Calaway contends his trial counsel rendered ineffective assistance by failing to object and move for a mistrial to what he claims was prosecutorial misconduct. "In order to establish a due process violation based upon prosecutorial misconduct, the defendant must first establish proof of misconduct." *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). Calaway contends his trial counsel failed to object to the prosecutor's comments which he viewed were racist. The prosecutor began his closing argument by stating:

Is it wrong for us to tip my head and dream about a world, about a world in a neighborhood where you don't have to worry about this stuff happening. Is it wrong for us to long for the days when we didn't lock our door and we sent the kids to play ball. No.

He later added a statement, harkening back to a similar statement from his opening argument, "There is a specific setting of society right here in Des Moines, Iowa, that believes that life is dispensable." Calaway contends that the jury may interpret racial overtones encompassed in the prosecutor's comments.

"A prosecutor is allowed some latitude during closing arguments, and . . . may argue the reasonable inferences and conclusions to be drawn from the

evidence.” *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003). The prosecutor “is not allowed to make inflammatory or prejudicial statements regarding a defendant in a criminal action.” *Id.* The district court found that upon examination of statements in the context of the entire trial, the prosecutor created a theme of “life is dispensable,” and these statements were not racist, but were a culmination of that theme. We agree. No group was identified by racial classification, and race was not explicit in any statements made by the prosecutor. While the statements were likely meant to evoke emotion, they were not based on race; therefore Calaway did not establish prosecutorial misconduct.

IV. Mistrial

Calaway claims that by failing to move for a mistrial after mention of a prior bad act, counsel was ineffective.¹ A mistrial is appropriate only when an impartial verdict cannot be reached or the verdict would have to be reversed on appeal due to an obvious procedural error in the trial. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). Calaway raised the issue of prior bad acts before the postconviction court, who found that counsel was not ineffective for failing to move for a mistrial. At trial, the State’s witness, Joseph Robinson, was asked if he had “ever seen the defendant with a gun before.” Robinson answered, “Yeah, the day he shot Patrick Johnson.” Immediately thereafter, Calaway’s counsel objected and moved to strike. The trial judge granted the motion to strike and

¹ Calaway further argued that counsel was ineffective for failing to file a motion in limine. He claims that counsel knew prior to trial that Robinson would testify to an extremely prejudicial account of Calaway shooting another person and therefore should have moved to exclude his testimony in a motion in limine. This claim is being raised for the first time in this appeal and as such, we will not address the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002).

immediately admonished the jury to “disregard that last response.” “The general rule is that improper testimony is not unduly prejudicial if the jury is admonished to disregard it.” *State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

In certain situations, an admonition to disregard testimony is not sufficient to cure the prejudicial effect, but we agree with the district court that in this case the immediate admonition was sufficient. *Id.* Moreover, there was no further information presented, such as whether Calaway intentionally or accidentally shot Johnson or what harm Johnson may have suffered. A trial court has broad discretion in ruling on motions for mistrial and new trial. *State v. Lindsey*, 302 N.W.2d 98, 101 (Iowa 1981). The district court stated that,

Calaway’s counsel did exactly what would have been demanded of a reasonably competent attorney under prevailing professional norms

. . . .
 . . . [I]n the context of the entire trial, this voluntary statement by Joseph Robinson which was immediately stricken from the record by the Court was not so egregious as to deprive the defendant of a fair trial.

As the State argues, this brief, volunteered response pales in comparison with the overwhelming evidence of Calaway’s guilt. *State v. Jefferson*, 574 N.W.2d 268, 275 (Iowa 1997). We agree with the district court that counsel was not ineffective for failing to move for a mistrial.

V. DNA Expert

Calaway next contends that counsel was ineffective for failing to retain a DNA expert for trial. He argues that the identity of the body found was an essential element of the case, and the proper tests were not conducted to prove that the body was indeed Stigler’s. The State introduced DNA testimony from

Michael Peterson of the DCI crime lab. Calaway contends that a DNA defense expert would have used different methods of testing, such as control dots, and would have reached a more precise result.

Although Calaway claims that without a DNA expert, there is no proof that Stigler's was the body found, even the absence of a body is not fatal to the State's case. "Corpus delicti," which may be established by circumstantial evidence, is made up of two elements: (1) a result has been produced, such as the killing of a human being, and (2) someone is criminally responsible for the result. *State v. Stamper*, 195 N.W.2d 110, 112-113 (Iowa 1972). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(p). A verdict can rest on circumstantial evidence alone. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct. App.1999). In this case, the conviction was clearly based on overwhelming evidence of Calaway's guilt and not entirely dependant on the DNA testimony.

Peterson, the State's expert, found that Stigler's parents, David Goudy and Paula Stigler, were within .5 percent of randomly selected African-American couples that could have been the parents of the body found. In other words, there was a 99.5% probability that they were the parents. Calaway presented an expert on post-conviction, Dr. Norah Rudin, who stated that Peterson's analysis contained prejudicial wording, and he should have been further cross-examined. Contrary to this statement, Rudin testified that Peterson's tests were not incorrect, just possibly weaker than had different questions been asked. Ultimately, she concluded that she would not come to a different result; the tests were not mathematically incorrect, she just would have presented them

differently. Therefore, Calaway presented no evidence on postconviction which would undermine Peterson's ultimate conclusion that the body found was that of Stigler.

Furthermore, testimony at trial linked Stigler to a cornfield, where the body was later found. An earring and a gold ring that Stigler was known to wear were found near the body, and his Fila shoes were also found nearby. Calaway's statements to several witnesses link him to a body shot in the back of the head, just as this body was found to have suffered. So, while additional tests could have been performed by other DNA experts, it would not have likely changed the outcome of the trial, as the evidence was overwhelming that Calaway shot a person, and that person was Stigler.

VI. Compulsion

Finally, Calaway contends that counsel was ineffective for failing to present a defense of compulsion. His arguments on appeal regarding compulsion have been expanded from those raised before the court on postconviction relief. There, Calaway argued that counsel should have retained an expert to testify about gang violence and a "culture of fear" created within the gang, presumably to demonstrate Calaway did not act voluntarily. As the district court observed, no such expert was produced at the postconviction hearing to support this proposition. See *Cox v. State*, 554 N.W.2d 712, 715 (Iowa Ct. App. 1996) (stating that independent evidence is necessary to establish a contrary expert opinion would exist). The district court found that Calaway's trial counsel did consider the compulsion defense, but "made a reasonable strategic decision not to have Calaway take the witness stand at trial." The district court concluded

that Calaway's trial counsel had a strategy to discredit the State's witnesses, which may have been undermined by the defense of compulsion; and by moving for a directed verdict and requesting a jury instruction, counsel was able to present a compulsion defense without testimony. Accordingly, "Calaway failed to prove any prejudice from any alleged failures of his trial counsel concerning this defense." We agree with the district court that counsel considered a defense of compulsion but chose an alternate defense strategy, and therefore was not ineffective. "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance." *Ledezma*, 626 N.W.2d at 143.

A new dimension of the same issue is being raised for the first time in this appeal. Calaway is asking this court to find that compulsion is a defense in a felony murder case when the underlying felony, kidnapping, does not require injury as an element.² Because this issue was not raised below, it is not preserved for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). Therefore, we will not consider this expanded issue.

VII. Pro Se Issues

Calaway also raises a number of pro se issues, which are either not preserved for our review, subsumed in his appellate counsel's briefs, or otherwise without merit.

² Even if this issue was preserved for appeal, there was no expert presented at the postconviction trial to support the viability of a compulsion defense. Further, one of Calaway's trial counsel testified that he understood that all participants in the killing fired a round into Stigler, "so that everyone is culpable as much as everyone else." As such, Calaway would have participated in more than the underlying felony.

VIII. Conclusion

For all of the reasons set forth above, we conclude the district court's well reasoned and detailed decision denying Calaway's application for postconviction relief should be affirmed.

AFFIRMED.