

IN THE COURT OF APPEALS OF IOWA

No. 3-439 / 12-1158
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALLAS JAY MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller,
Judge.

Dallas Miller appeals from his conviction and sentence for burglary and
intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams and
Patricia Reynolds, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Dallas Miller appeals from his conviction and sentence for burglary in the first degree and intent to commit sexual abuse. First, he argues the district court improperly denied his motion to suppress his confession, contending it was involuntarily made. Second, he argues he was provided with ineffective assistance of counsel when his attorney failed to request a mistrial immediately after the State made an inappropriate comment during closing argument. We affirm, finding Miller's confession was not involuntary and Miller's counsel provided effective representation.

I. Facts and Proceedings

September 8, 2011, J.M. awoke with a male figure above her, touching her head. She screamed, and the intruder fled through the window. Left behind were the following items: electrical tape, a loaded gun, a digital camera, a knife, clothing, and a notebook. J.M.'s family called the police; while driving towards the residence, the responding officer noted a dark-colored truck in a nearby parking lot. A photo of a matching truck was found on the camera left behind at the home. Police searched the license plate number of the truck in the photo and found it belonged to Miller. As they left, the dark truck seen in the commuter lot was gone. Miller's name was found on the notebook in the pocket of a shirt left behind. Miller and J.M.'s family were friends, and J.M.'s family had recently denied a request from Miller to borrow money.

A warrant was issued for Miller's arrest, and he was arrested at work that same day. After his arrest, Miller was interrogated regarding the events at J.M.'s residence in a room at the police station by Officer Kinney. Kinney has worked

as a deputy officer for twenty-six years; he is approximately six feet five inches tall and weighs 275 pounds. Miller was twenty-two years old, five feet five inches tall, and weighed 160 pounds at the time of questioning; he has an eighth-grade education. Kinney provided Miller with a document explaining his rights under *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966), and a waiver of those rights, which Miller signed. An audio and video recording of the interrogation was made and admitted into evidence during the hearing on Miller's motion to suppress the confession.

Kinney sat behind a desk initially; Miller sat on a stool on the other side of the desk. Kinney questioned Miller about the break-in, and Miller provided a story about another male being present at the home who orchestrated the incident. Kinney moved from behind the desk to sit near Miller and better see his body language. He continued to question Miller, telling Miller he knew he was lying. During the conversation, neither man raised his voice. Miller sat with his elbows on his knees, leaning forward. Kinney similarly leaned in, conversing within one or two feet of Miller's face. Miller eventually confessed to the break-in and incident with J.M.

Miller filed a motion to suppress the confession, claiming he made the admissions involuntarily in violation of his constitutional rights. The court heard testimony from Kinney and Miller, and watched the recording of the interrogation. Kinney admitted he was trying to "get in [Miller's] space" during the interrogation and partly make him uncomfortable. Miller testified to feeling uncomfortable when Kinney leaned in towards him and said he was intimidated. The court overruled the motion to suppress, concluding no promises of leniency were

made, and that “Kinney never verbally or by observable physical motion ever said or did anything that a reasonable person would consider threatening in nature.” It also concluded “Miller’s demeanor during this exchange does not indicate that he is fearful of or intimidated by Kinney.”

A jury trial was held May 8–10, 2012. During closing argument, Miller presented his argument that he had no specific intent to commit an assault. He contended that because he only touched J.M.’s face, criminal trespass was the appropriate verdict instead of burglary. In its rebuttal, the State argued, “Now, sometimes we get the paling effect. We think, ‘Well, gee, it could have been so much worse.’ And the State submits to you it could have been, except again—” to which Miller objected. The court sustained the objection, granted the motion that it precede the prosecutor’s comment, and instructed the jury to disregard the comment. Shortly thereafter, Miller requested to approach the bench and both counsel conferred with the court.¹

After the conclusion of the State’s rebuttal argument, the court completed the reading of the jury instructions and sent the jury to begin deliberations. Miller then moved for a mistrial or, in the alternative, a stronger admonition to the jury. The court denied the motion for mistrial and request for stronger admonition, finding the prosecutor’s improper comment was isolated and did not prejudice Miller. The court concluded its instruction to the jury to disregard the comment was sufficient. Miller appeals from both the denial of his motion to suppress and his motion for mistrial.

¹ The conversation held at the bench between Miller’s counsel, the prosecutor, and the court was not reported.

II. Analysis

A. Voluntariness of confession.

We review a motion to suppress based on the voluntariness of a confession de novo. *State v. Madsen*, 813 N.W.2d 714, 721 (Iowa 2012).

Under a constitutional totality-of-the-circumstances voluntariness analysis, statements are voluntary if the defendant's will is not overborne or his capacity for self-determination is not critically impaired. A number of factors help in determining voluntariness. Among them are: defendant's age; whether defendant had prior experience in the criminal justice system; whether deception was used; whether defendant showed an ability to understand the questions and respond; the length of time defendant was detained and interrogated; defendant's physical and emotional reaction to interrogation; whether physical punishment, including deprivation of food and sleep, was used.

Id. at 722–23 (internal citations and quotation marks omitted). Miller was twenty-two years old, had an eighth grade education, and had no prior experience with law enforcement. He was employed and lived alone. Miller understood and responded to the questions and did not appear intimidated or confused. The interrogation lasted an hour, and the officer did not use deception or threaten physical contact.

Miller's sole argument on appeal is that Kinney's posture was so intimidating that his confession was involuntary. While Kinney did lean towards Miller during the questioning, Miller also leaned towards Kinney. Only after the subject had turned to incidents beyond the break-in did both men cease leaning forward on their knees. At no time did either party raise his voice. After Kinney left, Miller went through the interrogation notes left on Kinney's desk. Nervousness alone does not render a confession involuntary. *State v. Cullison*, 227 N.W.2d 121, 127 (Iowa 1975). Further, being uncomfortable during

questioning is “not an abnormal physical or emotional condition.” *State v. Jennett*, 574 N.W.2d 361, 364 (Iowa Ct. App. 1997). We conclude the district court properly denied Miller’s motion to suppress.

B. Motion for mistrial.

We review a claim based on ineffective assistance of counsel de novo. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). While we normally preserve such a claim for postconviction proceedings, if the record on appeal is sufficient for our review, we will rule on the claim instead of preserving for later proceedings. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). An ineffective-assistance-of-counsel claim involves two elements: first, that trial counsel failed to perform an essential duty and second, that this failure resulted in prejudice. *Id.* Failure to succeed on either prong results in the failure of the ineffective-assistance-of-counsel claim. *Id.* An attorney is not required to raise a meritless claim. *Id.*

The State did not argue in the district court that Miller’s motion for mistrial was untimely² and does not make that argument on appeal. The court ruled on Miller’s motion on the merits, finding the comment was isolated, and that the curative instruction to the jury resolved any potential for prejudicial effect. We agree.

² “Where closing arguments are reported, certified and made a part of the record, objections to remarks of counsel during final jury argument are timely if urged at close of argument and in a motion for mistrial made before submission to the jury.” *State v. Nelson*, 234 N.W.2d 368, 371 (Iowa 1975) (citing *State v. White*, 225 N.W.2d 104, 105 (Iowa 1975) and *Andrews v. Struble*, 178 N.W.2d 391, 401–402 (Iowa 1970)). Here, counsel waited until after the jury had been given the case, but the State does not argue the motion was untimely, and the court ruled on the merits.

“Prosecutors have a dual function. They must vigorously prosecute defendants, but at the same time, they must assure the defendant a fair trial. Prosecutorial misconduct only warrants a new trial when the conduct is so prejudicial as to deprive the defendant of a fair trial.” *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002) (internal citations and quotation marks omitted). To prevail on a claim of prosecutorial misconduct, Miller must show both misconduct and resulting prejudice. *State v. Krogmann*, 804 N.W.2d 518, 526 (Iowa 2011). We look to the severity and pervasiveness of misconduct, whether the misconduct is significant to central issues in the case, the strength of the State’s evidence, whether the court used cautionary instructions or other curative measures, and the extent defense counsel invited the misconduct. *Id.*

The State’s case against Hill was strong, and the rebuttal argument comment was a single incident. Immediately after the comment by the prosecutor, counsel objected. The court sustained the objection and instructed the jury to disregard the comment. While the comment may have been improper, sufficient curative measures were taken. Any minimal resulting prejudice was not so pervasive as to deny Miller a fair trial.

We find on our de novo review that Miller’s confession was voluntary and that his counsel provided effective representation.

AFFIRMED.