

IN THE COURT OF APPEALS OF IOWA

No. 6-343 / 05-0882
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEVALS DUPRE NELSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr.,
Judge.

Devals Dupre Nelson appeals from his convictions following jury trial of
first-degree murder, willful injury resulting in serious injury, and assault causing
bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, William E. Davis, County Attorney, and Robert Cusack, Assistant
County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Devals Dupre Nelson appeals from the judgment and sentence entered by the district court after a jury returned verdicts finding him guilty of first-degree murder, willful injury resulting in serious injury, and assault causing bodily injury. Nelson contends his trial counsel was ineffective for failing to object at trial to certain statements made by the prosecutor in closing argument and for failing to object to the admission of the victim's dying declaration. We affirm.

I. Background Facts & Proceedings

On the evening of November 20, 2004, Alvern Kensinger was spending some time with his fiancé, Lisa Taylor. At some point, Kensinger received a telephone call from Stephen Toliver.¹ Toliver, who is known as "P," is the brother of the defendant, Devals Nelson. Following the call, Kensinger and Taylor drove Taylor's 1991 Jeep Cherokee to an alley near Sixth and Perry in Davenport. They arrived in the alley sometime between 10:00 and 10:30 p.m. and parked the vehicle.

According to Taylor, Kensinger got out of the vehicle as Toliver approached the Jeep. While Toliver and Kensinger were talking in the alley, Nelson ran up to them and started shooting at Kensinger.² Kensinger fled back to the Jeep. As he and Taylor began to drive away, bullets hit the vehicle,

¹ Taylor testified that Kensinger and Toliver were acquaintances and had met several times in the past, probably about drugs.

² A witness had seen Toliver and Nelson together prior to the shooting, and Nelson had a gun on his lap and was cleaning bullets.

shattering the passenger-side window.³ Two bullets hit Taylor. One struck her in the leg and the other in the abdomen. Kensinger was shot in head. He died as a result of the gunshot wound.

The State filed a trial information charging Nelson with first-degree murder and two counts of willful injury. At Nelson's trial, Taylor testified that after Kensinger was shot, he was "fading fast." Kensinger's foot was stuck on the accelerator of the Jeep, so Taylor had to move him out of the driver's seat to drive him to the emergency room. Taylor testified she was "100 percent sure" Nelson was the individual who had shot at her and killed Kensinger. Two additional witnesses corroborated Taylor's identification testimony. Cindy Agan, who lived near the scene of the shooting with her children, saw Nelson near the Jeep and identified him at trial as the man she had witnessed firing a handgun. Vianca Howard was outside when she heard shots fired. She saw Nelson and Toliver and identified Nelson as the shooter. In addition, Brenda Stone testified Nelson and Toliver came to her house after the shooting and Nelson had an automatic handgun in his possession.

On May 2, 2005, the jury found Nelson guilty of first-degree murder, willful injury resulting in serious injury, and assault causing bodily injury. Nelson filed a motion for new trial. The district court overruled the motion and sentenced Nelson to life in prison for the murder conviction. No sentence was imposed for the willful injury conviction because that offense merged with the first-degree murder conviction. Nelson was sentenced to one year for the assault causing

³ A total of eleven rounds from a .40 caliber semi-automatic pistol were fired at Kensinger and Taylor. The murder weapon was never recovered.

bodily injury, and the sentences were ordered to be served consecutively. Nelson now appeals.

II. Scope & Standards of Review

Nelson claims his trial counsel was ineffective for failing to object at trial to certain statements made by the prosecutor during closing argument and for failing to object to the admission of Kensinger's dying declaration. We review ineffective assistance of counsel claims de novo. *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998). Usually, we preserve ineffective assistance claims for postconviction relief; however, if the record sufficiently presents the issues, we will resolve the claims on direct appeal. *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). We find the record in this case adequate to rule on Nelson's ineffective assistance claims.

Nelson has the burden to establish by a preponderance of evidence that his trial counsel was ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). In order to prove his trial counsel was ineffective, Nelson must prove: (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish breach of duty, Nelson must overcome the presumption counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove prejudice, Nelson must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Nelson's ineffective assistance claims if he fails to

prove either breach of duty or prejudice. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

III. Prosecutorial Misconduct Claim

Nelson first contends his trial counsel was ineffective for failing to object to several statements made by the prosecutor during closing argument. The prosecutor stated, “Make no mistake, the facts of this case show [Nelson] is a very, very dangerous individual.” The prosecutor also argued:

Mr. Nelson didn't care about the other people around him. He didn't care about Lisa Taylor. He didn't care about the other people that were there. He didn't care about Cindy Agan's family, four kids and three visiting kids in a house about ten feet away from him when he's blasting away. He didn't care.

Based on our supreme court's pronouncements in *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003), Nelson contends these comments rise to the level of prosecutor misconduct.

Nelson argues the prosecutor's characterization of him as a “dangerous individual” was inflammatory and heaped unnecessary abuse upon him. He also asserts the prosecutor's statement about him not caring about children “appealed solely to the emotions and prejudices of the jury.” Nelson claims the latter statement lacks factual basis in the record.

We believe the statements made by the prosecutor during closing arguments at Nelson's trial are significantly different than the statements made by the prosecutor in *Graves*. In *Graves*, the prosecutor repeatedly referred to the defendant as a liar. *Id.* The *Graves* court found these and other comments supported the defendant's claim of prosecutorial misconduct. *Id.* However, the court also stated, “a prosecutor may argue the reasonable inferences and

conclusions to be drawn from the evidence.” *Id.* In this case, the prosecutor’s argument that “the facts of this case show [Nelson] is a very, very dangerous individual” is expressly based on the evidence in the record and reflects a reasonable conclusion to be drawn from the evidence. The record reveals Nelson and his brother lured Kensinger to a dark alley late at night, and while Nelson’s brother distracted Kensinger with conversation, Nelson ran up and shot at Kensinger. Nelson fired eleven rounds from his weapon. The victim was killed by a shot to the head, and Taylor was shot twice. This and other evidence indicates Nelson is a dangerous individual, and the prosecutor clearly articulated that “the facts of this case” led to that characterization. We find Nelson’s defense counsel did not breach any duty in failing to object to this statement at trial.

We also conclude Nelson’s defense counsel did not breach any duty in failing to object to the prosecutor’s argument that Nelson’s conduct revealed a lack of care for other people in the area. Nelson repeatedly fired a handgun within city limits near the dwellings of other citizens. Cindy Agan was close enough to the scene of the shooting to identify Nelson as the shooter when she ran outside to her garage after hearing gunfire. Nelson’s attack on Kensinger also resulted in injury to Taylor and could easily have injured other bystanders or the occupants of nearby homes. The prosecutor’s comment was reasonable given the evidence of the defendant’s conduct.

Even if we assume without deciding that Nelson’s trial counsel breached an essential duty by failing to object to the prosecutor’s closing argument, we find he was not prejudiced by the omission. Three witnesses identified Nelson as the shooter, and witnesses also saw Nelson in possession of a gun before and after

the murder. We conclude there is no reasonable probability that, but for counsel's failure to object to the closing argument, Nelson would have been acquitted.

IV. Victim's Dying Declaration

Nelson also contends his trial counsel was ineffective for failing to object to Lisa Taylor's testimony regarding statements made by her fiancé on the way to the hospital. Taylor testified that Kenzinger spoke to her after she moved him from the driver's seat of the car in order to drive him to the emergency room:

[T]he last thing he said was that he was sorry and that it was—he kept telling me P's brother, P's brother [Nelson] and he said he loved me and he was sorry for everything and that—I think that's when he died.

Nelson maintains this evidence was inadmissible under the exception for dying declarations.

A hearsay statement is admissible when it is “made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.” Iowa R. Evid. 5.805(b)(2). Nelson argues there is no way of knowing Kensinger believed his death was imminent because he was not in a hospital or hospice surrounded by trauma personnel when the statement was made. We find no merit in this argument. A dying declaration is not inadmissible simply because the declarant was not in a hospital or hospice at the time of the declaration. *State v. Sweeney*, 203 Iowa 1305, 1314, 214 N.W. 735, 739 (1927) (holding a dying declaration made by a victim at home and not in a hospital setting is admissible). Moreover, the record clearly supports the conclusion

Kensinger believed his death was imminent because he had just been shot in the head. Counsel had no duty to object on the ground that Kensinger's statement did not qualify as a dying declaration.

Nelson also asserts that the dying declaration was too speculative to be admissible because it did not clearly identify Nelson as the shooter. Kensinger kept telling his fiancé "P's brother, P's brother" after he had been shot. Kensinger and Taylor knew Nelson was P's brother, and the statement obviously referred to the man who shot him. We find Nelson's defense counsel did not breach any duty by failing to object to the victim's dying declaration on this basis. Furthermore, Nelson was not prejudiced by his counsel's failure to object because three witnesses in addition to Kensinger identified Nelson as the shooter. In addition, Nelson was observed with a gun before and after the murder. We conclude the result of Nelson's trial would not have differed if Nelson's counsel had objected to Kensinger's dying declarations.

V. Conclusion

Because we find no merit in any of Nelson's appellate claims, we affirm his convictions of first-degree murder, willful injury resulting in serious injury, and assault causing bodily injury.

AFFIRMED.